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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 393

STATE OF TENNESSEE, RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CAROLINA, CLINCHFIELD AND OHIO RAILWAY, ETC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

STATEMENT AS TO JURISDICTION

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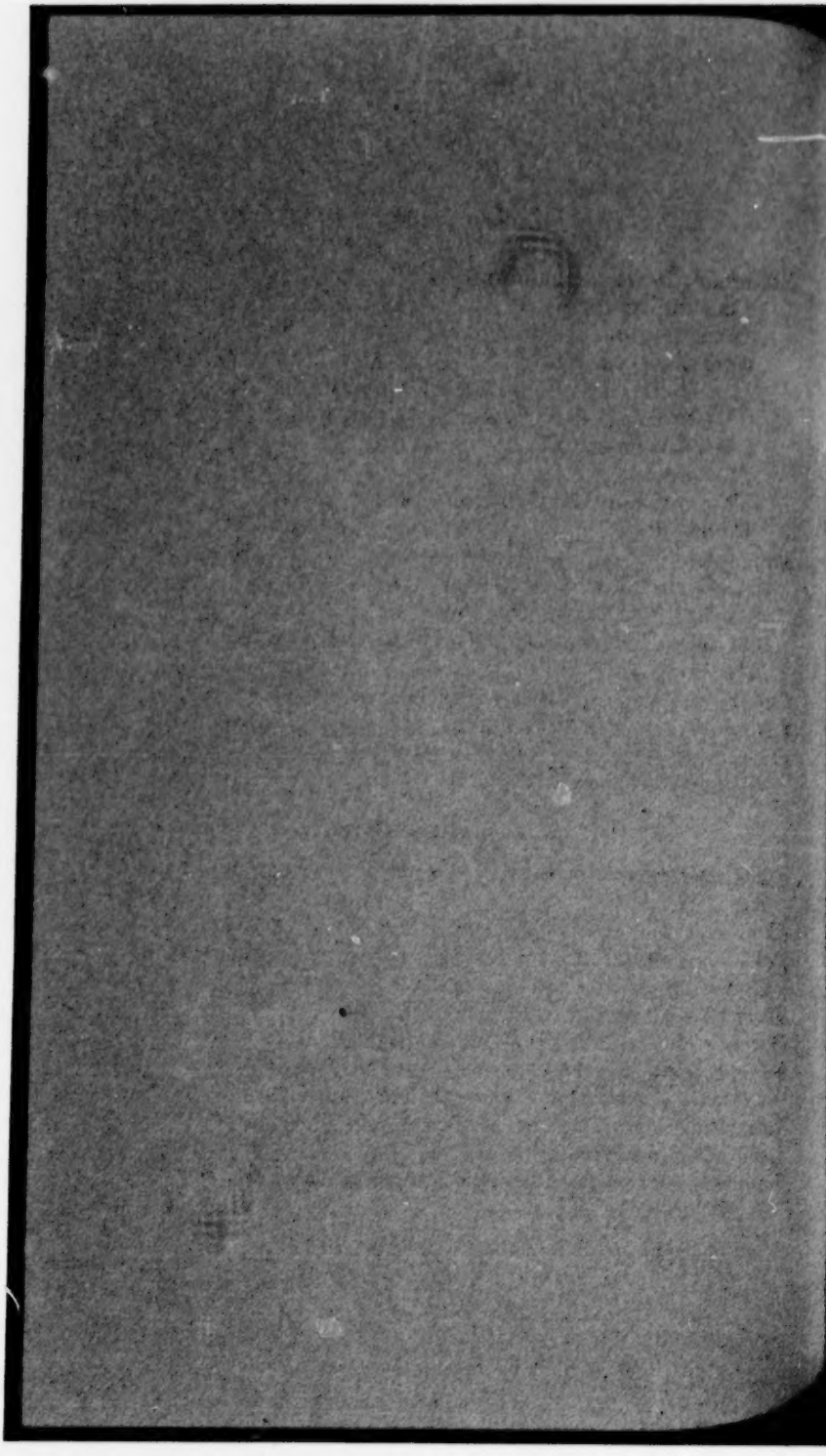

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 393

STATE OF TENNESSEE, RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, AND HAMMOND FOWLER, CAYCE PENTECOST, AND JOHN C. HAMMER, AS MEMBERS OF AND CONSTITUTING THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMISSION, ET AL.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the plaintiffs and the intervening plaintiff, Tennessee Valley Authority, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause.

Opinion Below

The district court did not render an opinion. Copies of the findings of fact and conclusions of law, and of the judg-

ment are attached hereto as Appendix A. Copies of the report and order of the Interstate Commerce Commission,[1] which the plaintiffs seek to have suspended, annulled, enjoined, and set aside in this action, are attached hereto as Appendix B.

Jurisdiction

The judgment of the district court was entered on July 31, 1953. A petition for appeal is presented to the district court herewith, to-wit, on September 2, 1953. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, sections 1253 (62 Stat. 928) and 2101(b) (62 Stat. 962). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Capital Transit Co.*, 325 U.S. 357; *North Carolina* v. *United States*, 325 U.S. 507; *King* v. *United States*, 344 U.S. 254.

Questions Presented[2]

A. *By the ICC Order as to Coal Rates*

1. Whether the ICC has authority to require that intrastate rates on a given commodity take the same increase as it has authorized on interstate rates in a general revenue proceeding, where the intrastate rates without the increase are already higher than the interstate rates with the increase and are contributing a greater proportionate share of the carriers' revenues.

2. Where in a proceeding under sections 13(3) and (4)

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[1] Hereinafter referred to as the "ICC."

[2] All the points raised in the assignment of errors are presented. The questions stated below set forth the major issues.

and 15a(2)[3] of the Interstate Commerce Act substantial evidence has been introduced that the intrastate rates on coal are on a higher basis than the interstate rates and are contributing a greater proportionate share of the carriers' revenues, whether an order raising the intrastate rates on coal on the ground that the interstate rates are causing undue, unreasonable, and unjust discrimination against interstate commerce is valid in the absence of a subsidiary finding that the intrastate rates are lower or are contributing a lesser proportionate share of the carriers' revenues than the interstate rates.

3. Whether the order referred to in question No. 2 is valid although there is no substantial evidence that the intrastate rates are lower or are contributing a lesser proportionate share of the carriers' revenues than the interstate rates.

4. Whether a state-wide order requiring that intrastate rates on coal be raised on the ground that such rates are causing undue preference and prejudice, supported only by a finding that "some of the Tennessee intrastate rates unduly prefer certain shippers and localities in intrastate commerce to the undue disadvantage of and prejudice to other shippers and localities in interstate commerce," is valid in the absence of a subsidiary finding specifying the particular rates which are causing undue preference and prejudice and the shippers or localities which are unduly prejudiced.

5. Whether the state-wide order referred to in question No. 4 is valid in the absence of a subsidiary finding sufficiently specific to form a basis for a conclusion that the

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[3] Section 13(3) and (4), 41 Stat. 484, as amended, 49 Stat. 543, as amended, 54 Stat. 911, 49 U.S.C. sec. 13(3) and (4).

Sec. 15a(2), 41 Stat. 488, as amended, 48 Stat. 220, as amended, 54 Stat. 912, 49 U.S.C. sec. 15a(2).

alleged preference and prejudice are so widespread and general as to justify a state-wide order.

6. Whether the state-wide order referred to in question No. 4 is valid although there is no substantial evidence that the alleged preference and prejudice are so widespread and general as to justify a state-wide order.

B. *By the ICC Order as to Pulpwood Rates*

1. Where a number of the major railroads, including some operating within the state, have established a scale of rates, on pulpwood, both interstate and intrastate within Southern Territory, which is lower than the scale authorized intrastate by the state commission, whether an order raising the intrastate pulpwood rates of the railroads in the states which have not adopted the lower scale on the ground that the intrastate rates are causing undue, unreasonable, and unjust discrimination against interstate commerce, is valid in the absence of a subsidiary finding either that operating conditions on such railroads are less favorable or that their needs for revenues are greater than those of the railroads which maintain a level of rates lower than authorized by the state commission.

Statutes Involved

Sections 13(3) and (4) and 15a(2) of the Interstate Commerce Act, as amended, and sections 7(c), 8(b), and 10(e) [4] of the Administrative Procedure Act are set forth in Appendix C hereto attached.

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[4] Sec. 7(c), 60 Stat. 241, 5 U.S.C. sec. 1006(c).
Sec. 8(b), 60 Stat. 242, 5 U.S.C. sec. 1007(b).
Sec. 10(e) 60 Stat. 243, 5 U.S.C. sec. 1009(e).

Statement

This case arises out of the series of general increases in railroad rates authorized by the ICC since 1946.[5] In Ex Parte 166 the ICC authorized the rail carriers to increase interstate freight rates generally in Southern Territory by 25 per cent, subject to various maxima and exceptions applicable to particular commodities. Following a hearing on the request of the railroads operating in Tennessee for like increases in Tennessee intrastate rates, the Tennessee Railroad and Public Utilities Commission granted the requested increases in full on all except five commodity groups, on which it authorized lesser increases.[6] In Ex Parte 168, the ICC granted a further increase of 10 per cent in interstate freight rates in Southern Territory, again subject to various exceptions and maxima. The Tennessee Commission authorized identical increases, with minor exceptions which are not here material.[7]

On petition of the rail carriers, the ICC thereafter instituted an investigation into the lawfulness of such rates in a proceeding entitled *Tennessee Intrastate Rates and Charges*, ICC Docket No. 30720.

Between the date of the decision of the Tennessee Commission in the proceeding before it involving the Ex Parte 166 increases and the decision of the ICC in Docket No. 30720, all of the disagreements between the parties had

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[5] This is the same series of increases involved in *King* v. *United States*, 344 U.S. 254, but the legal issues involved are different.

[6] On coal the ICC authorized a 20 per cent increase with a 40-cent per ton maximum; the Tennessee Commission authorized a 10 per cent increase with the same 40-cent per ton maximum. On wood the ICC authorized a 25 per cent and the Tennessee Commission a 15 per cent increase. As to other commodities, see footnote 8, *infra*.

[7] On coal and wood the same percentage increases were authorized but the increases were less in cents per ton than they would have been had the Tennessee Commission authorized the same increases intrastate as were authorized by the ICC for interstate traffic in Ex Parte 166.

been resolved except as to certain of the rates on coal and wood.[8] No issue was made before the district court as to wood other than pulpwood, thus leaving in issue only certain rates on coal and pulpwood.

At the hearing before the ICC examiner the plaintiffs[9] contended that, on the average, the intrastate rates on coal were on a higher level and were contributing a greater proportionate share of the revenues of the carriers than were the interstate rates.[10]

The principal evidence submitted in support of this contention was a cost study showing the average relationship of interstate and intrastate rates to the out-of-pocket and full distributed costs of handling the traffic.[11]

The costs were computed by an experienced transportation cost analyst in accordance with the formula known as Rail Form A. This form was developed by the ICC cost section for use in *Class Rate Investigations*, 1939, 262 I.C.C. 447 (sustained in *New York* v. *United States*, 331

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[8] These differences were resolved in three different ways. On some commodities the railroads voluntarily reduced their rates to levels lower than those authorized by the Tennessee Commission. Among the rates so reduced were a large segment of the rates on coal and pulpwood. As to other commodities, there was no showing of any intrastate movement at the hearing and therefore no order as to them was entered by the ICC. Finally, when the examiner who heard the case concluded that the intrastate rates on certain commodities given special treatment by the Tennessee Commission violated section 13(4) of the Interstate Commerce Act, the Tennessee Commission authorized the railroads to put into effect all of the increases which the examiner had recommended.

[9] Unless otherwise specified, the term "plaintiffs" as used herein includes the intervening plaintiff, Tennessee Valley Authority.

[10] They also contended that the coal industry in Tennessee was in a desperate situation due to competition of natural gas, oil, electricity, and lower-cost coal produced in adjoining states, and that there was substantial diversion to trucks of what intrastate coal movements remained.

[11] There is no distance scale of rates applicable to coal within the south. The relative levels of interstate and intrastate rates can be shown, therefore, only by the use of representative or average rates.

U. S. 284).[12] It was a major factor in the determination of that case and has since been used and relied on by the ICC in many other cases. The application of the Rail Form A formula makes it possible to ascertain the terminal cost and the cost per ton-mile of transporting a given commodity once the characteristics of the movement are defined.[13] The cost for any specified length of haul is then obtained by multiplying the number of miles by the car-mile cost, adding the terminal cost, and then dividing by the average number of tons per car.

The data as to average haul and average loading of interstate and intrastate movements required to complete the Rail Form A and the data as to average rates necessary to determine the relationship of rates to cost was obtained from studies prepared by the staff of the ICC which give statistics as to movements of coal in the year 1939, based on a one per cent sample of waybills covering railroad freight movements in that year. From this study the witness computed the average rates, distances, and loading for movements between points in Tennessee,[14] and for interstate movements within the south.

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[12] See *International Minerals & Chemical Corp.* v. *Atlantic Coast Line R. R.*, 269 I.C.C. 611, 623. The basic principle of Rail Form A is to classify all railroad operations among five so-called service groups—running, switching, station, special services, and general overhead expenses—and to assign to each service group an appropriate share of the various elements of rail transportation costs. Each individual expense account is assigned or apportioned to one or more of the service groups in accordance with standards specified in the formula. When this process is completed, the amounts assigned to each service group are aggregated and divided by the number of service units. For example, the costs which have been assigned on a cost per gross ton-mile basis are divided by the number of gross ton-miles to obtain the unit cost per ton-mile. The formula is discussed in *Class Rate Investigation*, 1939, 262 I.C.C. 447, 571-591, and in *New York* v. *United States*, 331 U. S. 284, 316-321.

[13] The transportation characteristics which must be defined include type of equipment, average loading, percentage of empty returns, loss and damage, etc.

[14] The movements between points in Tennessee include whatever traffic moves between points in Tennessee over interstate routes.

The application of the cost formula to the data computed from the waybill study shows that, on any basis of comparison, the intrastate rates without the increases produce a higher return above cost than do the interstate rates with the increases. The results of such application are as follows:

	Percentage of Out-of-Pocket Cost		Percentage of Full Distributed Cost—Constant Costs Applied On	
	Excluding Return on Value	Including Return on Value	Ton and Ton-Mile Basis	Basis of Out-of-Pocket Costs
Intrastate rates (without increases)	188%	174%	101%	115%
Interstate rates (with increases)	187%	168%	98%	111%

The cost testimony presented by plaintiffs is the only cost testimony in the record. The railroads offered none.

As to pulpwood, the facts as to the levels of interstate and intrastate rates maintained by the various railroads are undisputed. Plaintiffs contend that it is unlawful to require that the intrastate rates on some railroads operating in Tennessee be increased above the level authorized by the Tennessee Commission when that level is already above the interstate rates maintained by a number of railroads in Southern Territory, including the Southern and the CNO&TP, in the absence of any showing of a difference in operating conditions or need for revenue.

The ICC concluded that the intrastate rates on coal and pulpwood cause a revenue discrimination against interstate commerce but made no finding that the intrastate rates on coal were lower or less remunerative than the interstate rates. Neither did it find that operating condi-

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tions for pulpwood traffic on the other railroads in Tennessee were less favorable than on the Southern and the CNO&TP, or that the other railroads have any greater need for revenue from pulpwood traffic. As to coal, the ICC entered a state-wide order based on persons-and-places discrimination although its subsidiary finding is only that *some* of the Tennessee intrastate rates unduly prefer *certain* shippers and localities to the undue disadvantage of and prejudice to other shippers and localities, without specifying the rates, shippers, or localities.

The plaintiffs filed suit in the United States District Court for the Middle District of Tennessee to enjoin, annul, and set aside the ICC's report and order and the Tennessee Valley Authority intervened in support of the complaint.

The case was heard by a statutory three-judge court which made findings of fact and conclusions of law and entered a judgment dismissing the complaint. The legal questions on which the plaintiffs rely as outlined herein were argued to the court but most of them are not touched on in the findings of fact and conclusions of law. The court wrote no opinion.

The Questions Are Substantial

1. In previous cases before this Court involving the jurisdiction of the ICC under sections 13(3) and (4) and 15a(2) of the Interstate Commerce Act, the intrastate rates were concededly on a lower level than the interstate rates, and the issue was whether, under the circumstances disclosed by the record, the ICC had authority to require that the intrastate rates be raised to the interstate level. See *King* v. *United States*, 344 U. S. 254; *North Carolina* v. *United States*, 325 U. S. 507. So far as we are aware, this is the first case in which the ICC, faced with substantial evidence that the intrastate rates were on a higher level

and returning a greater percentage of revenue above cost than were the interstate rates, and with no substantial evidence to the contrary, has nevertheless ordered that the higher intrastate rates take the same increase as the lower interstate rates. This case, therefore, presents an attempt by the ICC to extend its jurisdiction over intrastate rates beyond any limits heretofore approved by this Court and raises a new and important question as to the authority of the ICC in general increase cases.

2. Section 8(b) of the Administrative Procedure Act requires the ICC to include in its decisions a statement of its findings and conclusions upon the material issues of fact presented on the record, and this Court has repeatedly stated that the ultimate conclusions of the ICC will stand only if supported by the necessary subsidiary findings.[15] The basic findings essential to the validity to any given order "will vary with the statutory authority invoked and the context of the situation presented" (*Alabama Great Southern R. R.* v. *United States*, 340 U. S. 216, 228), but the findings must be sufficient to show that the ICC has properly construed the statute. *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489.

Substantial evidence was introduced at the ICC hearing that the intrastate rates on coal were already higher than the interstate rates and were returning a greater proportionate share of the revenues required by the carriers. In the absence of a specific finding on this issue, the Court cannot know whether the ICC has construed its authority as permitting it to require that intrastate rates take all of the same increases as interstate rates even though they are already on a higher level and more remunerative. No such finding was made.

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[15] *King* v. *United States*, 344 U. S. 254, 269; *North Carolina* v. *United States*, 325 U.S. 507, 520; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489.

None of the findings made by the ICC is a substitute for the necessary finding that the intrastate rates on coal are on a lower level than the interstate rates or are returning a lesser proportionate share of the revenues required by the rail carriers. The ICC found that the intrastate rates on coal "are not contributing their fair share of the revenues required by the respondents to enable them to render adequate and efficient service and to operate profitably," but without the support of subsidiary findings, this is merely a conclusion; the ICC's concept of what constitutes a fair contribution for the intrastate rates here involved may well be a greater proportionate share than is being contributed by the interstate rates. This finding should be contrasted with the ICC finding in the proceeding involved in *King* v. *United States*, 344 U. S. 254. Although no question was raised in that proceeding as to the relative level of the interstate and intrastate rates, the ICC found that the Florida intrastate rates "*are abnormally low and are not contributing their fair share to the revenues* required by respondents to enable them to render adequate and efficient service and to operate profitably" (*King* v. *United States*, 344 U. S. 254, 268 (footnote 13)).

The omission by the ICC of the finding that the Tennessee intrastate rates "are abnormally low" in a finding which otherwise follows almost verbatim its finding with reference to the Florida intrastate rates cannot have been due to inadvertance. At sheet 22 of its report the ICC refers to the contentions "that intrastate coal rates in Tennessee are generally as high as or higher than interstate coal rates, and that the going intrastate coal rates are more remunerative to the respondents than the interstate rates." In discussing this contention the report does not question the propriety of using Rail Form A to determine the relative costs of handling interstate and intra-

state coal traffic, nor does it question the accuracy of the cost computations made by the witness. Its only criticism of the cost study is directed to the use of the underlying data obtained from the ICC waybill study. The point is made that the witness was not familiar with "the shipping points covered by the statements or the transportation conditions or circumstances surrounding the movements or the establishment of the rates changed." However, the witness used the waybill study simply to determine average rates, distances, and loadings for interstate and intrastate movements (and the ICC does not suggest that the one per cent sample was not representative.)

The use of the waybill study is also criticized on the ground that the Tennessee-to-Tennessee movement includes some interstate traffic moving between Tennessee points. But this fact does not destroy the probative value of the study. The study discloses that the average of the rates between points in Tennessee is higher in relation to cost than the average of the interstate rates. Unless, therefore, the interstate rates between points in Tennessee are on a higher basis than other interstate rates (and there is no such evidence in the record), the effect of including the interstate rates between points in Tennessee with the intrastate rates is to make the latter appear lower than they are.

The burden of proof on this issue was on the railroads (Administrative Procedure Act, sec. 7(c)). The railroads had complete data as to the interstate and intrastate movements but chose not to supply it for the record. The plaintiffs are entitled to the assumption that the data, if supplied, would have been unfavorable to their position[16]

[16] The picture presented by the waybill study can be corroborated by computing the relationship to cost of the rates shown on exhibits 5, 6, and 7 introduced by the L&N Railroad. These exhibits contain all necessary data as to distances and rates for movements originated by the

(*Interstate Circuit* v. *United States*, 306 U. S. 208, 226). The plaintiffs used the published data that was available and the showing they made should not be criticized because the ICC's waybill study does not break down the Tennessee-to-Tennessee movements between interstate and intrastate traffic.

Furthermore, since there was no substantial evidence to the contrary, the statement by the ICC that the plaintiffs' cost computations do not support "conclusively" their contention that the intrastate coal rates are generally higher and more remunerative than the interstate rates is tantamount to an admission that the evidence did support their contentions, even though not conclusively, and that had the ICC made a finding on this issue it would have

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L & N during a three-week test period. The plaintiffs' cost study discloses the cost per ton-mile and the terminal cost of handling coal traffic. To determine the relationship of these L & N rates to cost, therefore, it is necessary only to multiply the number of miles by the cost per ton-mile and add the terminal cost and then divide the cost thus ascertained by the rate. The computation does not appear in the record before the ICC but the rules of mathematics and their application under such circumstances are subject to judicial notice. See *Falls* v. *United States Savings, Loan & Bldg. Co.*, 97 Ala. 417, 431, 13 So. 25, 31; *Winterberg* v. *Thomas*, 246 P. (2d) 1058, 1061 (Colo.); *Murphy* v. *Murphy*, 144 Ark. 429, 435, 222 S. W. 721, 723; *Horen* v. *Davis*, 274 Pa. 244, 250, 118 Atl. 22, 24; *Levlon* v. *Dallas Ry. & Terminal Co.*, 117 S. W. (2d) 876, 878 (Tex. Civ. App.). A computation of the relationship of such rates to full distributed costs was attached as an appendix to our brief in the district court. The relationship shown was as follows:

	Percentage of Full Distributed Cost—Constant Costs Applied On	
	Ton and Ton-Mile Basis	Basis of Out-of-Pocket Costs
Intrastate rates shown on Exs. 5, 6, and 7	106%	121%
Interstate rates shown on Exs. 5, 6, and 7	103%	117%

had to find the facts as contended by the plaintiffs. This statement in the report can only be explained on the theory that the ICC was mistaken, both as to who had the burden of proof and what is required to meet the burden. It apparently assumed that the burden of proof lay not on the railroads but on the plaintiffs, and that the plaintiffs had the burden of proving their case not by the preponderance of the evidence but "conclusively."

An analysis of the other findings by the ICC would unduly prolong this jurisdictional statement. None of them meets the basic issue of whether the intrastate rates on coal are on as high a basis as the interstate rates and there is no substantial evidence in the record which would support a finding that they are on a lower basis had one been made. The situation presented to the Court in this case is similar to that in *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, in which the Court commented:

> Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away [p. 489].

3. The contention was advanced at the hearing by certain East Kentucky and West Kentucky producers that their competitive situation had been adversely affected at certain locations in Tennessee by the failure of the Tennessee Commision to authorize the full interstate increases on intrastate movements of coal. The evidence presented as to each location was sharply contradicted by Tennessee producers

of coal. The ICC has found that "some of the Tennessee intrastate rates unduly prefer certain shippers and localities in intrastate commerce to the undue disadvantage of and prejudice to other shippers and localities in interstate commerce" (sheet 30). The rates, shippers, and localities are not designated. On the basis of this finding the ICC concludes that the intrastate rates on coal "are causing undue preference of and advantage to persons and localities in intrastate commerce, and undue prejudice and disadvantage to persons and localities in interstate commerce" (sheet 31) and has entered a state-wide order requiring an increase in all Tennessee intrastate rates on coal, except the rates as to which the carriers have withdrawn their request for an increase. Such indefinite findings will not support a state-wide order based on persons-and-places discrimination. *Florida* v. *United States*, 282 U. S. 194, 208-209; *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. R.*, 257 U. S. 563, 579-580; cf. *King* v. *United States*, 344 U. S. 254, 269 (footnote 14).

4. The Southern, the CNO&TP, and other major southern railroads have put into effect, for general application, both interstate and intrastate within Southern Territory, a scale of rates on pulpwood lower than that authorized by the Tennessee Commission. They have stated specifically that they do not desire any increase in the intrastate rates for movements on their lines, and the ICC has expressly excepted the intrastate rates over these lines from its order requiring that Tennessee intrastate rates on pulpwood be raised. There is no showing in the record that operating conditions on the railroads operating in Tennessee, other than the Southern and CNO&TP, are any less favorable than on these railroads or that the other railroads have any greater need of revenues. As to pulpwood, therefore, the question is whether the ICC can find that the intrastate rates author-

ized by the state commission impose a revenue burden on certain of the railroads simply because they are on a lower level than those railroads would like to charge where they are, in fact, on a higher level than are maintained on a large and important segment of the interstate traffic.

5. The present case is not controlled by the decision in *King* v. *United States*, 344 U. S. 254. As already pointed out, the *King* case involved rates which the ICC had found to be abnormally low. In the present case there is no such finding but, on the contrary, a record which establishes that the intrastate rates were higher than the interstate rates. Furthermore, the *King* case involved a refusal by the Florida comission to permit the same increase intrastate on commodities generally as was authorized on interstate traffic. As the Court pointed out, the ICC had fixed the increases on interstate traffic on the assumption that "generally similar increases will be permitted by States authorities on intrastate traffic" (344 U. S. 258). In the present case the Tennessee Commission has permitted "generally similar increases" but it has considered the peculiar local problems presented by specific movements of coal and pulpwood. As the Court pointed out in *King* case, it is not necessary for the ICC "for general revenue purposes, to establish for each item in each freight rate a fully developed rate case" (344 U. S. at 275). Such a procedure would obviously be impossible. But it is not impossible for the state commission, in passing on requests for and granting increases in intrastate rates "generally similar" to those granted in interstate rates, to consider the special facts involved in the intrastate movement of individual commodities and to tailor its order to meet the peculiar local needs. This is the only justification for the holding of hearings by state commissioners on proposed intrastate increases following ICC decisions in general increase cases. If state commissions

cannot go so far, the ICC, in general increase cases, should order into effect increases in intrastate as well as interstate rates. For the ICC to take such action—which would of course amount to prescribing intrastate rates rather than taking any authorized action under section 13(4) of the Interstate Commerce Act—would amount only to doing directly what it is here seeking to do indirectly. Conceivably, Congress could authorize the ICC to take such action on the basis of proper legislative findings, but it has not done so.

Conclusion

The present case involves a new and important question as to whether the ICC can extend the jurisdiction conferred upon it by section 13(4) of the Interstate Commerce Act so as to require that all intrastate rates take the same increases as are prescribed by it for interstate rates in general increase proceedings, even though the intrastate rates are already higher and more remunerative than the interstate rates. Questions of administrative law of the gravest important are also involved in the issue whether the ICC can avoid making findings on substantial issues of fact presented on the record and by resort to vague and indefinite findings can deprive the courts of the opportunity of determining whether statutory standards have been correctly applied.

Respectfully submitted,

ALFRED T. MACFARLAND,
Counsel for Plaintiff-Appellants, State of Tennessee, Railroad and Public Utilities Commission of the State of Tennessee, and Hammond Fowler, Cayce Pentecost, and John C. Hammer, as members of and constituting the Railroad and Public Utilities Commission of Tennessee;

JOSEPH C. SWIDLER,
Counsel for Intervening Plaintiff-Appellant Tennessee Valley Authority.

APPENDIX "A"

FINDINGS OF FACT AND CONCLUSIONS OF LAW, DATED JUNE 8TH, 1953, AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION, DATED JULY 31ST, 1953

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Civil No. 1595

STATE OF TENNESSEE AND RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE, ET AL.,

VS.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

FINDINGS AND CONCLUSIONS

The above entitled action was heard before the duly constituted statutory court composed of Honorable John D. Martin, Circuit Judge, presiding, Honorable Elmer D. Davies, District Judge, and Honorable Marion S. Boyd, District Judge, on May 18, 1953.

Appearances: For plaintiffs, Alfred T. MacFarland, General Counsel, Railroad and Public Utilities Commission of Tennessee, Nashville, Tennessee. For intervenor in support of the complaint, Robt. H. Marquis, Attorney, Tennessee Valley Authority, Knoxville, Tennessee. For defendants, A. O. Denning, United States Attorney, Nashville, Tennessee, and S. R. Howell, Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C. For intervenors in opposition to the complaint, C. P. Reynolds, Attorney, Washington, D. C., James A. Bristline, Attorney, Washington, D. C., and Robert E. Webb, Attorney, Louisville, Kentucky.

The cause was submitted upon the pleadings, exhibits, and argument of counsel for plaintiffs, intervenors, and

defendants, and, after due consideration thereof, the Court enters its Findings of Fact and Conclusions of Law, as follows:

Findings of Fact

1. In a case known as Ex Parte 166, the Class 1 rail carriers applied to the Interstate Commerce Commission (hereinafter called the ICC) for a general increase of their freight rates and charges. The ICC, in response to the application, granted an increase of 25 per cent in freight rates and charges generally in southern territory, with certain modifications as respects particular commodities. The ICC granted an increase in southern territory interstate coal rates of 20 per cent, subject to a maximum of 40 cents per net ton, and an increase of 25 per cent in southern territory interstate rates on wood.

2. Subsequent to the final decision of the ICC in Ex Parte 166, the rail carriers operating in Tennessee petitioned the Railroad and Public Utilities Commission of Tennessee (hereinafter called the Tennessee Commission) for the same percentage increases in Tennessee intrastate rates (with certain exceptions as to some commodities) which the ICC had granted in interstate rates. All of these carriers requested the full interstate increases in Tennessee intrastate coal rates. They also originally requested the full interstate increases in wood rates, but the Southern and the C. N. O. & T. P. withdrew their request for any intrastate increase in pulpwood rates, having previously applied to the Tennessee Commission for authority to put into effect in Tennessee, as soon as certain contingencies had been met, intrastate rates on pulpwood lower than those previously authorized by the Tennessee Commission. Pulpwood rates in southern territory have been based on the so-called Roanoke Rapids scale, adopted by the Seaboard Airline Railroad in 1909. Since that date, there have been authorized increases in interstate pulpwood rates of 81.5 per cent above the Roanoke Rapids scale, and increases in intrastate rates in various southern states ranging from 19.9 per cent in South Carolina to 67.9 per cent in Mississippi. The increases authorized in Tennessee intrastate rates are 59.4 per cent. On November 1, 1951, a group of southern rail

carriers, including the Southern, C. N. O. & T. P., Seaboard Airline, and a number of other railroads, published rates on pulpwood for general application both interstate and intrastate in southern territory based on the Roanoke Rapids scale plus 50 per cent. The ICC has instituted an investigation as to the lawfulness of these new rates, but it refused to grant an application of the Atlantic Coast Line and Louisville and Nashville Railroads that they be suspended pending the outcome of the investigation, and these rates are now actually in effect for movements over the railroads which have published them. These rates are lower than those authorized by the Tennessee Commission for intrastate application in Tennessee.

3. The Tennessee Commission, following extended hearings, has issued orders authorizing the petitioning carriers to increase their Tennessee intrastate rates in the same percentages and amounts as were authorized by the ICC in Ex Parte 166 for southern territory interstate rates except in the case of certain commodities as to which the railroads themselves did not seek the full interstate increases, a few others on which there has not been shown to be any actual carload movements intrastate in Tennessee, and coal and wood. On coal, the Tennessee Commission authorized increases of 10 per cent in lieu of the 20 per cent authorized interstate by the ICC, subject to the same 40 cents per net ton maximum authorized interstate by the ICC. On wood, it authorized 15 per cent in lieu of the 25 per cent authorized interstate by the ICC.

4. In a later case known as Ex Parte 168, the ICC ordered further increases in southern territory interstate rates of 10 per cent, subject to certain exceptions and maxima with respect to particular commodities. Thereafter, on petition of the rail carriers operating in Tennessee, the Tennessee Commission, after hearing, granted for intrastate application in Tennessee increases 10 per cent over the then existing rates which is the percentage granted by the ICC in Ex Parte 168, but then again refused to authorize increases in coal and wood rates corresponding fully to those authorized by the ICC in Ex Parte 166 proceeding.

5. On November 2, 1950, the rail carriers operating in Tennessee petitioned the ICC under Section 13(4) of the Interstate Commerce Act for an order requiring, in substance, that Tennessee intrastate coal and wood rates be increased by the amounts necessary to reflect the same percentage increases as the ICC had authorized in Ex Parte 166 for interstate application in southern territory.

6. A hearing was held on the petition of the rail carriers on March 7, 8, and 9, at Nashville, Tennesse, before ICC Examiner Andrew C. Wilkins. At the hearing, the carriers withdrew any request for increases in coal rates to Nashville and Old Hickory, Tennessee, and to intermediate points taking the same rates, to all of which points the carriers had voluntarily reduced rates below the level authorized by the Tennessee Commission. Corresponding reductions were also made from interstate mines to these destinations. Thereafter the Examiner issued a proposed report in which he found that no increases should be ordered by the ICC in Tennessee intrastate rates on coal or wood.

7. On May 19, 1952, following the filing of exceptions to the Examiner's proposed report and oral argument, the ICC, Commissioner Splawn dissenting, issued a report finding those Tennessee intrastate rates on coal and wood (except the rates to Nashville, Old Hickory, and intermediate points and the pulpwood rates of the Southern Railway and C.N.O. & T.P. Railroad) to be violative of Section 13 (4) of the Interstate Commerce Act. It thereafter, on August 19, 1952, issued an order denying petitions for reconsideration and directing the carriers to put into effect new intrastate rates on coal and wood reflecting the same increases as those previously granted by the ICC in intrastate rates on those commodities. The ICC excepted from its order rates on coal to Nashville, Old Hickory and intermediate points taking the same rates. As to pulpwood, the ICC excepted from its order the rates of the Southern and the C.N.O. & T.P., which rates are below the level authorized by the Tennessee Commission.

8. The railroads operating in Tennessee thereafter published tariff supplements under which the increases ordered by the ICC would have become effective October 25, 1952.

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The Tennessee Commission, on October 10, 1952, instituted the present action seeking to enjoin and set aside the ICC's report of May 19, 1952, and order of August 19, 1952. The United States of America adopted a neutral position with respect to the complaint. The Tennessee Valley Authority intervened in support of the complaint. The rail carriers, the ICC, and some of the Kentucky coal operators intervened in opposition to the complaint.

* * * * *

The Court adopts the following findings of the Interstate Commerce Commission, all of which findings are supported by substantial evidence:

> 9. "1. The conditions incident to the intrastate transportation of freight in Tennessee are not more favorable than those incident to the interstate transportation of freight between points in Tennessee and between Tennessee, on the other hand, and the adjoining States in southern territory, on the other."

This finding of the Commission is supported by the evidence (Tr. 32-56), and by many previous decisions of the Commission, among which are, Southern Class Rate Investigation, 100 I. C. C. 513, 623; Southern Cement Rates, 132 I. C. C. 427, 455; Sand, Gravel, Slag, Stone and Chert, 165 I. C. C. 731; Increases in Tennessee Freight Rates and Charges, 272 I. C. C. 625, 646.

> 10. "2. The amounts and percentages by which interstate freight rates and charges between points in Tennessee and points in adjoining States were increased, as authorized in Ex Parte Nos. 166 and 168, are just and reasonable."

Finding No. 2 is substantially the same as the finding made in Ex Parte No. 166, Increased Freight Rates, 1947, 270 I. C. C. 403, 456 and Ex Parte No. 168, Increased Freight Rates, 1948, 276 I. C. C. 9, 113.

> 11. "3. As to coal, there is active competition between persons and localities engaged in interstate commerce

between points in Tennessee and points in other States, on the one hand, and persons and localities engaged in intrastate commerce in Tennessee, on the other."

The above finding is supported by the evidence cited on pages 47-55, inclusive, of the Commission's report in this case. The references to the pages of the transcript where the evidence will be found are shown in Appendix C to the Brief of the I. C. C., pages 11-14, 18-22, 23-29, 38-42.

12. "4. The intrastate rates and charges in Tennessee on chemical, acid, pulp and fuel wood and on coal, except to Nashville and Old Hickory and intermediate points taking the same rates, are not contributing their fair share of the revenues required by the respondents to enable them to render adequate and efficient service and to operate profitably; are causing undue, unreasonable, and unjust discrimination against interstate commerce; and as to coal, with the exception noted, are causing undue preference of and advantage to persons and localities in intrastate commerce, and undue prejudice and disadvantage to persons and localities in interstate commerce."

Finding No. 4 is supported by Findings Nos. 1, 2, 3, and 6 and by evidence showing the railroads' need for additional revenue, which evidence is summarized in the Commission's report (286 I. C. C. 45-46, 58, and Appendix B) and will be found in the record, Tr. 330-403.

13. "5. The unjust discrimination and undue preference and prejudice herein found to exist should be removed by applying to the Tennessee intrastate rates and charges on the commodities described in finding 4 the same respective increases as authorized thereon in Ex Parte Nos. 166 and 168 which are and for the future may be maintained by the respondents on like interstate traffic between points in Tennessee and points in adjoining southern States: provided that no intrastate rate or charge on pulpwood shall be increased so that it will exceed the lowest level of the correspond-

ing interstate rates on pulpwood maintained by the same carrier to or from Tennessee points."

Finding No. 5 like Finding No. 4 is an ultimate finding, and is supported by all other subsidiary findings and is an exercise by the Commission of its statutory power to eliminate the unjust discrimination against interstate commerce and the undue preference and prejudice as between persons and localities found to exist.

14. "6. The establishment of increases in intrastate rates and charges as provided in finding 5 will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, and will substantially increase the respondents' revenues."

Finding No. 6 is supported by the evidence, 286 I. C. C. 44-45, 55, 58-59; Tr. 8-9, 114-115, 134-135, 167, 175, and 205. The amount of the revenue the railroads will receive from the increases ordered in the intrastate rates on coal and wood was estimated at approximately $135,000 per year (286 I. C. C. 44).

15. "7. The assailed rates and charges, except as appears from the foregoing findings with respect to coal and wood, are not shown to cause undue or unreasonable advantage, preference, or prejudice, or to cause undue, unreasonable, or unjust discrimination against interstate commerce."

The findings of the Commission also included a saving clause reading as follows:

"These findings and conclusions are without prejudice to the right of the authorities of the State of Tennessee, or any other interested party, to apply for a modification thereof as to any specific intrastate rate or charge affected thereby on the ground that such rate or charge is not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act."

The Court finds that the findings of the Commission are supported by substantial evidence on the record as a whole.

Conclusions of Law

1. The Court concludes that it has jurisdiction of this suit under Sections 1336, 2284 and 2381-25 of Title 28 of the United States Code and Section 17(9) of the Interstate Commerce Act (49 U. S. Code, 17.9).

2. The Court concludes that the Interstate Commerce Commission had jurisdiction to enter the order complained of under Section 13 of the Interstate Commerce Act (49 U. S. Code, Section 13).

Wisconsin RR Commission v. CB&QR, 257 U. S. 563.

3. The findings of the Interstate Commerce Commission are adequate to support the challenged order of the Commission.

U. S. v. Louisiana, 290 U. S. 70; King v. U. S., 344 U. S. 254, 97 Law Ed. (Adv. page 207).

4. The Court concludes that the Commission order is valid, being supported by adequate findings based on substantial evidence; that the application for an injunction should be denied, and the complaint should be dismissed.

Judgment accordingly.

(S.) JOHN D. MARTIN,
United States Circuit Judge.
(S.) ELMER D. DAVIES,
United States District Judge.
(S.) MARION S. BOYD,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Civil No. 1595

STATE OF TENNESSEE, et al., *Plaintiffs,*

v.

UNITED STATES OF AMERICA, *Defendant*

FINAL JUDGMENT

This cause coming on to be heard before the undersigned, constituting a special District Court of three judges con-

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vened pursuant to 28 U.S.C. 2284(1), and 2325, upon an application for an interlocutory and a permanent injunction; and being heard and considered upon the full record of the proceedings before the Interstate Commerce Commission as well as upon arguments and briefs of counsel; and the cause having been submitted for final decree; and the Court having made its findings of fact and conclusions of law which have heretofore been filed:

Now, therefore, upon the basis of such findings of fact and conclusions of law, it is ordered, adjudged and decreed that the injunction and other relief prayed for in the complaint be denied, that the suit be dismissed, and that costs be taxed against the plaintiffs.

This the 31st day of July, 1953.

Approved as to form:

(S.) JOHN D. MARTIN,
United States Circuit Judge.
(S.) ELMER D. DAVIS,
United States District Judge.
(S.) MARION S. BOYD,
United States District Judge.

(S.) ALFRED T. MACFARLAND,
(S.) SAMUEL R. HOWELL,
Atty. for I.C.C.
(S.) CHARLES P. REYNOLDS,
(S.) JAMES A. BISTLINE,
(S.) WILLIAM H. SWIGGART,
(S.) PRIME F. OSBORNE,
Attys. for Intervenor R.R.
(S.) ROBT. E. WEBB,
Atty. for Kentucky Coal Agency.
(S.) JOSEPH S. SWIDLER,
Tenn. Valley Authority.

APPENDIX "B"

REPORT OF THE INTERSTATE COMMERCE COMMISSION

No. 30720

TENNESSEE INTRASTATE RATES AND CHARGES

Submitted March 19, 1952. Decided May 19, 1952.

1. Tennessee intrastate rates and charges on coal and wood found to cause unjust discrimination against interstate commerce, and as to coal, undue preference of and advantage to persons and localities in intrastate commerce, and undue prejudice and disadvantage to persons and localities in interstate commerce.

2. Tennessee intrastate rates on agricultural slag, alfalfa meal, brick (fire or paving), phosphate rock, and sand (except common), found not shown to cause undue or unreasonable advantage, preference, or prejudice, nor unjust discrimination against interstate or foreign commerce.

Charles Clark, Frank W. Gwathmey, Y. D. Lott, Jr., W. A. Northcutt, Earle J. Zoll, Jr., M. T. Hastings, L. L. Oliver, Chas. P. Reynolds, C. S. Blackman, L. C. Bruce, H. L. Haines, P. E. Geil, and Elias Lyman, Jr., for respondents.

D. S. Browder, Roy Carson, W. L. Pedigo, William M. Maddox, and C. E. Widell for various shippers and other organizations supporting respondents.

G. Edward Friar and Hammond Fowler for Railroad and Public Utilities Commission of the State of Tennessee, protestant.

Joseph C. Swidler, Charles J. McCarthy, Robert H. Marquis, John C. Lovett and Sol Edidin for Tennessee Valley Authority, protestant.

W. W. Glenn, L. A. Gossage, J. Walter Harding, Thomas L. Howard, F. F. Kator and L. R. Steinback for shipper, protestants.

JOHNSON, *Commissioner:*

Exceptions to the report proposed by the examiner were filed by the respondents and other parties, replies were

made, and the issues were argued orally before us. Our findings and conclusions differ in part from those recommended by the examiner. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

In response to a petition by 14 rail carriers operating in the State of Tennessee, this investigation was instituted by our order of December 4, 1950, to determine whether the rates [1] and charges of such carriers, or any of them, operating in Tennessee for the intrastate transportation of property made or imposed by authority of the State of Tennessee, cause or will cause, by reason of the failure of such rates and charges to include increases corresponding to those permitted by us for intrastate traffic in Ex Parte No. 166, *Increased Freight Rates, 1947*, 269 I.C.C. 33, 270 I.C.C. 81, 93, and 403; and Ex Parte No. 168, *Increased Freight Rates, 1948*, 272 I.C.C. 695 and 276 I.C.C. 9, any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, and to determine what rates and charges, if any, or what maximum or minimum, or maximum and minimum, rates and charges shall be prescribed to remove the unlawful advantage, preference, prejudice, or discrimination, if any, that may be found to exist. All common carriers by railroad operating within the State of Tennessee, subject to our jurisdiction, were made respondents,[2] and copies of the

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[1] Rates and charges are stated in amounts per 100 pounds, unless otherwise indicated, and do not include the general increases authorized in 1951.

[2] The principal respondents include the Carolina, Clinchfield and Ohio Railway, The Cincinnati, New Orleans and Texas Pacific Railway Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Louisville and Nashville Railroad Company, The Nashville, Chattanooga & St. Louis Railway, Southern Railway Company, and Tennessee Central Railway Company. These carriers will be referred to by their short titles.

order of investigation and notice of hearing were duly served upon them and upon the State of Tennessee.

In our final decision in Ex Parte No. 166, 270 I.C.C. 403, decided on July 27, 1948, we authorized, with certain exceptions, a general increase of 25 percent in the rates and charges of respondents and others in southern territory. Thereafter, on October 22, 1948, the respondents requested the Tennessee Commission to authorize these same increases in the intrastate rates and charges in Tennessee, and on March 11, 1949, the Tennessee Commission granted a general increase of 25 percent, to become effective not earlier than March 20 of that year, except that the increase was limited (1) to 10 percent on various commodities, including coal and coke, fertilizer, agricultural limestone, agricultural slag, brick, clay, sand, and cement; and (2) to 15 percent on wood, chemical, acid, pulp, and fuel. Following the issuance of our interim report in Ex Parte No. 168, 272 I.C.C. 695, the respondents, on April 2, 1949, requested the Tennessee Commission to grant the same increases as authorized therein, and again asked for the full amount of the increases previously requested on October 22, 1948. A hearing was held, but before the Tennessee Commission rendered its decision we issued our final report in Ex Parte No. 168 on August 2, 1949 (276 I.C.C. 9), wherein we authorized another general increase of 10 percent with certain exceptions, within southern territory. The respondents then filed an amended petition with the Tennessee Commission on September 22, 1949, requesting it to grant the full amounts of all increases in Tennessee intrastate rates and charges as authorized by us in interstate rates and charges in both Ex Parte Nos. 166 and 168. Pursuant thereto, the Tennessee Commission authorized a general increase of 10 percent to become effective not earlier than June 1, 1950, but subject to further and additional exceptions. The exceptions included the rates and charges on alfalfa meal by reducing the rating thereon from approximately 22.5 to 18.5 percent of the first-class rates, and on phosphate rock. The excepted commodities which were the subject of the hearing herein, together with the increases thereon authorized by us and by the Tennessee

Commission, are set forth in appndix A hereto. The increases authorized by us were made effective on interstate traffic to, from, and between points in Tennessee and, with few exceptions, are now in effect.

In the proposed report in this proceeding, which was served on November 21, 1951, the examiner recommended a finding that the Tennessee intrastate rates and charges should be increased to the same extent that the interstate rates and charges were increased with respect to agricultural limestone, cement, fertilizer, clay, and coke, and with respect to switching service on all of the commodities named in appendix A hereto. Following the filing of exceptions and replies thereto, the Tennessee Commission issued supplemental opinions and orders authorizing the respondents to establish the increases as recommended by the examiner. Accordingly, no further consideration will be given to the intrastate line-haul rates and charges on agricultural limestone, cement, fertilizer, clay, and coke or to the intrastate switching charges on any of the commodities named in appendix A.

Results of traffic study.—For the purpose of determining the losses sustained by respondents because of the failure of the Tennessee Commission to grant the full increases in the intrastate rates as authorized in the interstate rates, a traffic study was made. The study included both the intrastate and interstate movement of the excepted commodities terminated by six[3] of the respondents during three weeks in 1950. The weeks selected were April 3 to 8, as representative of late winter and early spring; July 17 to 22, as representative of mid-summer; and October 23 to 28, as representative of late fall and early winter. In making the selection no consideration was given to the relation of the weekly movement during those weeks to the movement during other weeks in the same months or during the other weeks of that year. The representative character of the weeks selected is supported by the fact that the tonnage terminated by the Nashville, Chattanooga & St. Louis,

[3] Nashville, Chattanooga & St. Louis, Southern (including the Cincinnati, New Orleans & Texas Pacific), Louisville & Nashville, Illinois Central, Clinchfield, and Gulf, Mobile & Ohio.

which has 72 percent of its mileage in Tennessee, averaged 3,190 cars per week during the weeks selected and its weekly average during the year 1950 was 3,029 cars.

During the test period the total number of cars of the excepted commodities terminated by the six respondents at Tennessee destinations following intrastate and interstate movements, respectively, were: Coal, 957 and 3,213; wood, chemical, pulp, fuel, 236 and 387; alfalfa meal, 0 and 1; brick, fire, paving, 0 and 43; phosphate rock, 0 and 21; sand, other than common, in closed cars, 0 and 17; and slag, agricultural, 0 and 27.

Based on the Tennessee intrastate movement during the test period of all of the commodities named in appendix A, projected on a yearly basis, the estimated losses sustained by the six respondents, due to their failure to secure the full intrastate increases as authorized on interstate traffic, were: Nashville, Chattanooga & St. Louis, $73,668.80; Southern, $222,078.84; Louisville & Nashville, $63,528.64; Illinois Central, $17,870.84; Clinchfield, $16,495.96; and Gulf, Mobile & Ohio, $19,587.88; or a total of $413,230.96. After eliminating the estimated losses in connection with agricultural limestone, cement, fertilizer, clay, and coke, and for intrastate switching, the respondents conclude that the losses on the remaining commodities were approximately $135,000.

The estimated losses shown above were determined by rerating the tonnage that moved intrastate in Tennessee during the test period to reflect the revenue that would have accrued if the full amounts of the increases authorized in Ex Parte Nos. 166 and 168 had been in effect at that time. This basis did not reflect any possible loss of intrastate movements of these commodities to trucks. Witnesses for respondents had given consideration to the possibility of diversion of this traffic to motor trucks and were of the opinion that any diversion of these particular commodities would be of little consequence. The witnesses were experienced and responsible traffic officials of respondents. One of the respondents conducts trucking operations through a highway subsidiary, blanketing most of its line of railroad of some 3,000 route-miles. The traffic manager

of this respondent, in addition to his railroad duties, participated for about 12 years in the development and management of the motor truck and bus operations of the highway subsidiary. Based upon his past experience, it was his opinion that the imposition of the additional increases here sought in the Tennessee intrastate rates on the excepted commodities would divert very little traffic to motor carriers, and would give respondents substantially increased net revenues.

Relative transportation conditions.—The Nashville, Chattanooga & St. Louis may be regarded as a typical Tennessee rail line insofar as transportation conditions are concerned. About 72 percent of its main-line mileage and approximately 78 per cent of its total branch-line mileage are located in Tennessee, the remainders being in Alabama, Georgia, and Kentucky. Although the same trains handle both interstate and intrastate traffic, the proportion of intrastate traffic handled in local freight trains in Tennessee exceeds that handled in through freight trains. The unit cost of handling a certain quantiy of freight for a given distance in local trains is greater than that of handling the same quantity for the same distance in through trains. The reason is that through trains are operated primarily for handling traffic moving between terminals, while local trains perform the switching in picking up and delivering cars at local stations, require more overtime in handling lighter tonnage for shorter runs, and must be made up and broken up at each terminal. The evidence supports the contention of respondents that the conditions at the time of the hearing fully substantiate the finding in *Increases in Tennessee Freight Rates and Charges*, 272 I. C. C. 625, at page 646:

> That the conditions incident to the intrastate transportation of freight in Tennessee are not more favorable than the conditions incident to the interstate transportation of freight in the South generally, that the greater part of Tennessee intrastate traffic is handled in local trains, and that the cost of handling intrastate traffic in local trains in Tennessee is greater than the cost of handling interstate traffic in through trains of the respondents.

Revenue needs of respondents.—In an effort to show their need for additional revenue, exhibits setting forth the financial condition of the principal respondents were introduced in evidence. The value of railway property used in transportation service, the net railway operating income, and the rate of return, after accrued depreciation, of the Southern, Cincinnati, New Orleans & Texas Pacific, Illinois Central, Gulf, Mobile & Ohio, Nashville, Chattanooga & St. Louis, Louisville & Nashville, and Tennessee Central for and between the years 1947 and 1949 are shown in appendix B hereto. None of the respondents, except the Cincinnati, New Orleans & Texas Pacific, earned as much at 5.5 percent in any of these years. The Nashville, Chattanooga & St. Louis and the Tennessee Central, which are primarily Tennessee lines, had the lowest earnings of any of these respondents. The Tennessee Valley Authority shows the earnings of these respondents both before and after deductions for federal income taxes. It takes the position that such taxes are not a proper charge to operations. This Commission and the courts have held otherwise. *Minnelusa Oil Corp.* v. *Continental Pipe Line Co.*, 258 I. C. C. 41, and cases cited therein.

Increased cost of necessary materials and supplies, increased taxes, and the increased wages of their employees are given as the principal reason for respondents' need of additional revenue.

From 1947 to 1950 the unit cost of some particular commodities indicated some decreases but increases predominated. Taking the average unit cost of materials and supplies for the period 1935 to 1939 as 100 percent, the total increases in the unit cost from 1940 to 1950, inclusive, ranged from about 108 percent to about 148 percent. Taxes on unemployment insurance decreased due to a change in the rate from 3 percent to 1.5 percent by Act of Congress in 1947. Other taxes show an increase of more than 300 percent during the period 1940 to 1950. For the same period the average increase in the straight-time hourly rate and in the annual compensation per employee was over 100 percent.

Freight-train service operating statistics of the principal

respondents, for the period 1940 to 1950, support the contention of respondents that they are being operated efficiently. The record also shows that respondents have made considerable expenditures during the same period for improvement of their properties to increase the efficiency of their operations.

Protestants do not seriously question the need of additional revenue by respondents. The Tennessee Commission takes the position that if it had granted the full increases on the excepted commodities the additional diversion of their movement from the rails and the rail movement prevented by such increases due to use of substitute materials, would have decreased the total revenues of the rail-carrier respondents.

The evidence indicates that respondents are in need of additional revenue to maintain adequate and efficient railway transportation service over their lines.

Diversions to Intrastate routes.—When the rates between points in Tennessee were the same over intrastate and interstate routes there was little necessity for specific routing and shipments generally moved over the short routes. Following the refusal of the Tennessee Commission to grant the full amounts of the Ex Parte Nos. 166 and 168 increases in the intrastate rates, shippers began to route their shipments of the excepted commodities over intrastate routes to obtain the lower intrastate rates. Many of the intrastate routes are much longer than the interstate routes between the same Tennessee points. The record contains numerous illustrations. For example, from Cowan, Tenn., to Cleveland, Tenn., the distance is 92 miles over the short interstate route and 359 miles over the short intrastate route. At the time of the hearing the intrastate rate on cement from Cowan to Cleveland was 20 cents, and the interstate rate sought was 22 cents. The use of the intrastate routes by shippers to obtain the lower rates not only diverted traffic from the normal interstate routes but resulted in the additional burden of increased cost of handling the traffic over the longer routes. Respondents were thereby deprived of the benefit of the full measure of the ex parte increases and were required to furnish additional and unnecessary

service in transporting the traffic over the longer routes. The diversion of shipments of the excepted commodities from normal interstate routes to the longer intrastate routes became so serious that 12 of the respondents amended their tariffs to apply the intrastate rates as maxima over interstate routes between Tennessee points between which there are both intrastate and interstate routes.

Coal. In Tennessee coal deposits are widely scattered. Numerous bituminous coal mines are operated from the vicinity of Chattanooga northeastward along Waldens Ridge and the Cumberland Plateau beyond Knoxville to the East Tennessee-Kentucky border. Coal mines are also operated across that border in eastern Kentucky, and in nearby Virginia and in the western part of Kentucky. Many of the mines are served by short rail lines and branch lines of the larger rail carriers. A number of the mines are not located on rail lines and are served only by motor trucks.

In Jellico, Tenn., and Middlesboro, Ky., mine groups embrace mines in both Tennessee and Kentucky, which are served by two different branch lines of the Southern. A number of the mines in these groups are also served by the Louisville & Nashville. Shipments from some of the Tennessee mines in these groups must move over interstate routes to Tennessee destinations. Normally the rates from all mines in a group to common destinations are the same over both interstate and intrastate routes. Due to the failure of the Tennessee Commission to permit the full increases in the intrastate rates, the operators who can ship over intrastate routes have a rate advantage over their competitors who must pay the higher rates over interstate routes from Tennessee mines to destinations in Tennessee.

Coal mines in Tennessee north and west of Knoxville include the Glen Mary, Petros, Lake City, Pioneer, and Monterey groups. Many of these mines are served by short rail lines such as the Brimstone Railroad Company, the Oneida & Western Railroad Company, the Emory River Railroad Company, and the Tennessee Railroad Company. The Tennessee Central serves a number of the mines. Some of the coal mines north and west of Chattanooga are the

Tracy City and Palmer mines on the Tracy City branch, and the Pikeville and Whitwell mines on the Pikeville branch, of the Nashville, Chattanooga & St. Louis. Coal from mines on the Tracy City branch to Tennessee destinations can move over intrastate routes, but from the mines on the Pikeville branch the shipments must move over interstate routes.

Competition between the various groups of mines is keen in the sale of their coal in common markets. Tennessee mines must also meet the competition of the coal from mines in Kentucky, Virginia, West Virginia, Alabama, and Illinois. An extensive rate structure based on differential rates from the various competing groups of mines to common markets was begun by the rail carriers more than 50 years ago. Although new mines have been opened as old ones became exhausted, and changes have occurred in prices and markets for coal, the differential rate pattern in this area remained relatively constant from about 1907 to 1946. As indicated in *Stearns Coal & Lbr., Inc.* v. *Aberdeen & R. R. Co.*, 216 I. C. C. 789, the differential between the East Kentucky and East Tennessee groups was 10 cents per ton between 1907 and 1920. Under the general increases of 1920 it became 12.5 cents and was reduced to 11 cents under the general reductions of July 1, 1922. In the decision cited the Stearns Coal & Lumber Company assailed the differential as unduly prejudicial to its mines in eastern Kentucky and unduly preferential of competing mines in eastern Tennessee as applied to shipments of coal to the South, but division 4 found to the contrary and dismissed the complaint. The normal differentials have been successively disturbed by the general increases authorized in Ex Parte Nos. 162, 166, and 168. The manager of the Chattanooga branch of the Stearns Coal & Lumber Company testified in this proceeding to the effect that the differential between that company's mines in eastern Kentucky and the Glen Mary group in eastern Tennessee has now become 32 cents per ton, which has resulted in the loss of sales of coal in Chattanooga The witness referred to the loss of the sale of 1,200 tons bought by the City of Chattanooga from the Glen Mary mines in 1951. On cross-examination this witness admitted that coal

movement in trucks to Chattanooga had increased some, that natural gas had been installed in 1950, and that his company had not sold any substantial amount of coal to the City of Chattanooga since 1944 or 1945.

The vice-president and traffic manager of the Kentucky & Tennessee Railway which serves the mines of the Stearns Coal & Lumber Company in the Pine Knot group of Kentucky, testified that the mines on the short rail lines in the Glen Mary group constitute the real competition for the Kentucky & Tennessee Railway mines. From its connection with the Cincinnati, New Orleans & Texas Pacific at Stearns, Ky., the Kentucky & Tennessee operates 19.68 miles of main line serving four major coal-mine operations with normal production of 800,000 tons annually. The normal differentials in the rates from mines in the Pine Knot group is 11 cents per ton over those in the Glen Mary group to points in Tennessee and south. Due to the general increases and the failure of the Tennessee Commission to permit the full increases in the intrastate rates, this differential has been increased to as much as 35 cents per ton to certain destinations. This short line contends that the effect of this discrimination against interstate commerce has been considerable curtailment of the movement of coal from the mines on this line.

To 50 destinations in Tennessee the mines on the Kentucky & Tennessee shipped 222,427 tons of coal in 1947, 160,106 in 1948, 91,532 in 1949, and 80,983 in 1950. To some of the larger markets in Tennessee the tonnage figures in 1947 and 1950, respectively, were 78,659 and 23,951 to Chattanooga, 39,145 and 19,355 to Nashville, and 34,946 and 4,808 to Harriman. The mines on this short line shipped 6,897 tons to Oak Ridge in 1947 and none since, and the tons shipped to Watts Bar Dam were 3,849 in 1947 and 655 in 1950. It was admitted that the fuel-generating plant at the atomic-energy installation at Oak Ridge had been converted to the use of natural gas, but that installation still uses some coal which is obtained at mines nearer than those on the Kentucky & Tennessee. The witness for the Kentucky & Tennessee considers the restoration of the normal differential as necessary if the coal mines on that line are to con-

tinue in business, which is vital to the very existence of that carrier. If the increases here sought in the Tennessee intrastate rates were made effective, the differential would be only slightly higher than the normal differential.

The normal differential in the rates on coal from the western Kentucky mines to Memphis on June 30, 1946, was 10 cents per ton under the Tracy City and Whitwell Tenn., mines on the Nashville, Chattanooga & St. Louis north of Chattanooga. At the time of the hearing the rate from western Kentucky was 6 cents higher than the rate from the Tracy City mines, instead of the normal 10 cents under that rate, on traffic to Memphis. From the Whitwell mines the rate to Memphis was 11 cents higher than the rate from western Kentucky. This is due to the fact that coal from the Whitwell mines to points in Tennessee must move over interstate routes while traffic from Tracy City can move over either intrastate or interstate routes.

A witness for the large Palmer coal mine on the Tracy City branch of the Nashville, Chattanooga & St. Louis referred to the lower intrastate rate of $2.54 per ton from that mine to Columbia, Tenn., as compared with the rate of $2.75 per ton from western Kentucky mines to the same destination. The lower intrastate rate is due in part to the failure of the Tennessee Commission to permit the full increases in those rates. Although the Palmer mines would like to keep the lower rate, the witness indicated that they realize it is not a fair adjustment and that they were more vitally interested in a stable adjustment by restoration of the normal relation between competing groups which had been disrupted by the action of the Tennessee Commission. This witness, who also represented the Tennessee Manufacturers Association and various Tennessee industrial interests, supported in general the increases here requested by respondents. Aside from the strenuous objections voiced by a witness representing the western Kentucky coal producers to the discrimination against them, this is an example of the discrimination by one group of Tennessee mines shipping on intrastate rates against another group of Tennessee mines shipping on interstate rates to the same Tennessee

market, due to the failure of the Tennessee Commission to permit the full increases in the intrastate rates.

Another witness for the western Kentucky coal producers showed that their coal shipments to Memphis declined from 109,828 tons in 1948 to 67,690 tons in 1949 and to 60,925 tons in 1950. This was not due to lack of production as there were 700 cars of coal on the tracks unsold at the time of the hearing. Memphis is so situated that its rates on coal from certain mines in Alabama, western Kentucky, and Illinois are the same. This witness attributed the loss of tonnage to an increase in shipments of coal from the competing mines and the lower intrastate rates from Tennessee mines. On cross-examination he expressed the opinion that the major factor was gas competition. Coal shipments from mines in western Kentucky to the entire State of Tennessee declined from 1,425,893 tons in 1948 to 1,064,186 tons in 1949, and to 1,027,779 tons in 1950. Admitting that competition from other producers and gas had accounted for some of the loss, the witness insisted that the lower intrastate rates in Tennessee which had disrupted the rate structure were a very vital factor in the movement of coal.

The Harlan County Coal Operators Association, composed of operators of coal mines in Harlan and Bell Counties, Ky., and the Hazard Coal Operators Association, composed of operators of coal mines in Perry, Letcher, and Knott counties, Ky., were represented at the hearing by their traffic manager. The members of these associations produce both domestic and steam coal in the southeastern part of Kentucky. They ship to destinations throughout the State of Tennessee in active competition with coal mines and producers in Tennessee. The primary interest of these southeastern Kentucky coal producers in this proceeding is the relation of their rates with those of their competitors in the Tennessee markets. Their secondary interest is the level of the rates. To some Tennessee Markets their differential over competing Tennessee mines has increased as much as 39 cents a ton since 1946. Of this amount, 17 cents is the result of the general percentage increases and 22 cents is the result of the failure of the Tennessee Commission to permit the full amount of those increases in the intrastate

rates. Restoration of the normal differentials is most important to these coal producers to again place them on a fair basis with their Tennessee competitors who now ship on the lower intrastate rates. They have presented the matter of restoration of the normal differentials before the carriers and progress has been made, but final restoration cannot be brought about until the intrastate rates are placed on the same basis as the interstate rates.

Most of those who oppose any further increase in the Tennessee intrastate rates on coal are coal dealers and associations of dealers in Chattanooga and in the Nashville area, including Old Hickory, Tenn. These include the Chattanooga Coal and Coke Dealers Association, the Coal Heating Service of Chattanooga, the Rossville Coal and Supply Company of Chattanooga, the Nashville Coal Company with producing mines in western Kentucky, the Nashville Coal Heating Service, the Progressive Coal Company of Nashville, the Nashville Coal Institute, and the Fentress Coal & Coke Company with office at Nashville and mines near Monterey. In addition to these, the increase sought is opposed by the Tennessee Coal Company and the A.B.C. Coal Company of Monterey, and the Tennessee Valley Authority which operates a number of steam-generating plants at hydro-electric dams on navigable streams in Tennessee.

During the past few years the tonnage handled by these coal dealers has been declining and they believe that any further increase in the coal rates will result in additional losses. The losses have been due in part to the increases in the price of coal and in the growing use of electricity, oil, and gas. The use of gas has not been confined to the heating of residential units. Some of the large office buildings and industrial plants, particularly in the Nashville area, have been converted to the use of natural gas. For example, a large industrial plant at Old Hickory formerly used coal entirely to meet its fuel needs. One of the coal dealers at Nashville who had sold a substantial amount of coal to this plant was informed that unless lower rates on coal could be obtained consideration would be given to the use of natural gas. This dealer conferred with representatives of the rail carriers over a period of about 12 months

in an effort to retain this coal business by securing a reduction in the rail rates. His efforts were unsuccessful and the plant was converted to the use of natural gas to the extent of about two-thirds of its fuel needs. Thereupon, the Tennessee Central reduced its rate on coal from the Monterey district to Old Hickory in the amount of about 50 cents per ton, which it is hoped will result in retaining the balance of the fuel needs of that plant for coal. This reduction had the effect of reducing the intrastate rate on coal below the level authorized by the Tennessee Commission, and counsel for the respondents stated that no increase is sought in the rate to Old Hickory.

Most of the coal used in the Nashville area comes from the western Kentucky mines. After the carriers applied the increases authorized by us in Ex Parte No. 168 the rate from those mines to Nashville became $2.24 per net ton. The same rate became applicable from the Whitwell mines on the Nashville, Chattanooga & St. Louis, as the shipments from such mines must necessarily move over an interstate route through Alabama, but from the Palmer mines served by that carrier the rate to Nashville became $2.06 per net ton by reason of the lower increases authorized by the Tennessee Commission. Because of the additional use of natural gas in the Nashville area, the rate to Nashville from all of these mines was reduced to $2 per net ton in the latter part of 1950, and the rates from other mines in Tennessee, Kentucky, and Virginia were reduced on a comparable basis. Accordingly, the respondents are not here seeking any increase in the rates on coal to Nashville or to points intermediate thereto where the rates were reduced to the same extent as to Nashville.

Producers of coal on the Tennessee Central have lost some of their usual Tennessee markets to producers in western Kentucky. The mining costs in western Kentucky are lower than in Tennessee and the western Kentucky operators are therefore able to absorb some of the higher interstate freight charges so as to sell in Tennessee in competition with Tennessee coal which moves on lower intrastate rates. The wage scale in Kentucky is said to be less than in the Monterey district, and the Kentucky mines are highly mech-

anized while the conditions in the Tennessee mines make mechanization impractical. Witnesses for operators of mines in the Monterey district testified that when shipments move by rail it is necessary to haul the coal in trucks for about 5 miles where the rail cars are loaded by the use of ramps. At the time of the hearing the price per ton of stoker coal f.o.b. mines was $8 in eastern Tennessee and $7.50 in eastern Kentucky and Alabama. To Chattanooga the rate per net ton was $2 intrastate and $2.32 interstate from eastern Tennessee, $2.52 from eastern Kentucky, and $2.90 from Alabama.

As a result of the rationing of gasoline and tires during World War II, the transportation of coal by truck from mines not served by rail lines but within trucking distance of markets was considerably curtailed. With the removal of rationing restrictions and the increases in rail rates, the hauling of coal by trucks has increased substantially. For example, there are numerous mines within 25 miles of Chattanooga which are not served by rail lines, and at the time of the hearing the trucks were hauling about 100,000 tons of coal per year into that city. It was estimated that this movement would be increased by about 50 percent if the increases sought became effective. However, there is still a substantial amount of coal which moves to Chattanooga by rail. For example, during the three-week test period the Southern transported to Chattanooga 188 carloads under intrastate rates and 169 carloads under interstate rates.

The Tennessee Valley Authority operates its steam-generating plants at the hydro-electric dams when the stream-flow conditions are poor, and for this purpose many thousands of tons of coal are used annually. The plants are so located and equipped that they receive shipments by rail, truck, and barge. The plant at Watts Bar, for example, is located on the Tennessee River about midway between Knoxville and Chattanooga. Rail shipments thereto are terminated at Spring City, Tenn., and switched thence to the plant by the Cincinnati, New Orleans & Texas Pacific under a special contract. During 1950 the Watts Bar plant received 38,522 tons of coal by truck, 92,911 tons by barge, and 437,328 tons by rail, the latter moving from Tennessee origins at

intrastate rates. The amount of coal shipped by rail to the Watts Bar plant during 1950 from interstate origins or at interstate rates is not shown, but the Southern terminated at Spring City 5 carloads (266 tons) during the three-week test period from two origins in Kentucky. The record indicates that the rail shipments were transported at the published tariff rates.

The contracts for the purchase of coal by the Tennessee Valley Authority are based on the price at the mines, and it pays the transportation charges to the plants, whether the shipments move by rail, truck, or barge. The cost of fuel approximated 80 percent of the total cost of operating the steam plants during 1950, and the intrastate freight charges on coal were about 23 percent of the total delivered cost of the coal. The Tennessee Valley Authority is concerned over any increase in such costs and the amount of any increases in the Tennessee intrastate rail rates may determine whether additional use will be made of trucks and barges in transporting coal to its plants in the future, or whether additional use will be made of other fuels.

Some of the plants of the Tennessee Valley Authority which formerly used coal have been converted to the use of gas. The plant at Memphis uses gas and oil. The burners at the Watts Bar plant are equipped to use gas but the natural gas-transmission line is about 20 miles therefrom. A new plant at Johnsonville, Tenn., on the Tennessee River about 80 miles west of Nashville, was expected to be completed and in operation in October 1951. The coal requirements for this plant are estimated to exceed 2 million tons a year. Of the amount of coal used during 1950 at the steam plant at Hallsborough, Tenn., located on the Tennessee River about 20 miles west of Chattanooga, 6,875 tons moved by rail (terminated at Ladds, Tenn.) and 101,310 tons moved by truck. Most of the coal used at this plant is obtained at mines in the vicinity thereof. During 1950, 23 percent of all coal used at the various steam plants in Tennessee was purchased at points in Tennessee and moved intrastate.

In support of its contentions that intrastate coal rates in Tennessee are generally as high as or higher than interstate coal rates, and that the going intrastate coal rates are more

remunerative to the respondents than the interstate rates, the Tennessee Valley Authority relies upon computations based upon excerpts from the Carload Waybill Analyses, 1948, Statement No. 5032 and Statement No. 5028, issued in June, 1950, by our Bureau of Transport Economics and Statistics. The computations were made by witnesses who could not give any of the shipping points covered by the statements or the transportation conditions or circumstances surrounding the movements or the establishment of the rates charged. The cost computations were also made in connection with excerpts from the waybill analyses statements. The traffic statistics included both intrastate and interstate movements. In the circumstances, the computations do not support conclusively these contentions. The evidence of record supports the conclusion that the respondents, after the decision of 1925 in the southern class rate investigation, adopted and have since followed the policy of maintaining intrastate rates throughout southern territory on the same relative level as interstate rates on practically all commodities. With respect to Tennessee, the exceptions are due to the action of the Tennessee Commission in refusing to permit the intrastate rates on certain commodities to be increased to the full extent authorized in the interstate rates.

The Tennessee Commission takes the position that if it had not restricted the increases from the high tide of all-time high freight rates on the excepted commodities, the trucks would have taken away so much of that traffic that interstate commerce would then have truly been burdened because the business would have been diverted from the railroads, and the total revenues of the respondents would have decreased. The chairman of the Tennessee Commission appeared as a witness and referred to the widely-diversified resources of the State of Tennessee and its many peculiar problems and local situations. He expressed the view that the Tennessee Commission "is entitled to have reasonable leeway and latitude in determining local conditions and the impact of these local conditions and local situations upon intrastate freight charges." It is the judgment of that Commission that the restrictions which it placed upon the increases on the excepted commodities

resulted in a level of rates which are not burdensome on interstate commerce but are good business for the rail carriers.

All of the parties, including the respondents, agree that there is keen competition between coal and other fuels, particularly natural gas, at certain points in Tennessee, and that the delivered cost of coal, including the freight charges, may determine whether coal or some other fuel will be used. This is demonstrated by the previously-mentioned reductions in the rail rates to Old Hickory and Nashville. There is likewise competition between the transportation agencies, rail, truck, and barge, but it is apparent that all of this competition affects the interstate movement of coal as well as the intrastate movement. Responsible officials of the respondents who have considered these matters insist that the increases sought will result in substantial increases in their revenues on coal.

As hereinbefore indicated, many of the parties are seriously concerned with the disruption of the normal relationship in the rates from one group of mines as compared with those from other groups, and some of them contend that the action of the Tennessee Commission has created an artificial barrier against the interstate transportation of coal. The action of that Commission not only resulted in a serious disruption of the normal relationship in the rates from the various groups, but in some instances disrupted the rates from mines in the same group. For example, to Chattanooga the rate from mines on the Kentucky & Tennessee Railway was 11 cents per ton higher than the rate from mines on the Tennessee Railroad prior to the Ex Parte No. 166 increases. If the Tennessee Commission had authorized the same increases from mines on the Tennessee Railroad which we authorized in Ex Parte Nos. 166 and 168 from mines on the Kentucky & Tennessee Railway, the difference in the rates from these respective mines, after the application of such increases, would have been 14 cents, but because of lower increases authorized by the Tennessee Commission the difference became 32 cents. Similarly, to Chattanooga the rate from all mines in the Jellico group was $1.76 per ton prior to the Ex Parte No.

166 increases. Some of the mines in the Jellico group, including Jellico and Clairfield, are located in Tennessee and others, including Fonde, are located in Kentucky, and shipments from Clairfield must move for a short distance through Kentucky. After the increases authorized by us in Ex Parte Nos. 166 and 168 were established, the rate from Clairfield and Fonde to Chattanooga became $2.32 per ton, but the lower increases authorized by the Tennessee Commission resulted in a rate of $2.13 per ton from Jellico.

Wood.—The rates in southern territory on chemical, acid, pulp, and fuel wood are generally on the bases of distance scales. Most of the rates on pulpwood in the South have been based on the so-called Roanoke Rapids scale, which was established by the Seaboard Air Line Railroad Company in 1909 for single-line movements to Roanoke Rapids, N. C. Some of the rates on pulpwood are based on other scales, a few of which are lower and others are higher than the Roanoke Rapids scale as modified by the various rate increases.

As a result of the limited increases authorized by the Tennessee Commission, the Roanoke Rapids scale of rates on pulpwood in Tennessee ranges from 15 to 72 cents per cord of 128 cubic feet lower than the scale generally applicable on interstate movements in southern territory.[4]

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[4] At the time of the hearing herein, the Southern, including the Cincinnati, New Orleans & Texas Pacific, and the Seaboard had under consideration a proposal to establish a uniform scale of rates on pulpwood for single-line movements over their lines between all points in the South to apply on both interstate and intrastate traffic. The proposal was to use the basic Roanoke Rapids scale in effect on March 27, 1938, increased by 50 percent. This uniform scale was established by these and certain other carriers on November 1, 1951, which, for their account, had the effect of reducing the interstate rates, and the intrastate rates in Alabama, Florida, Louisiana, Mississippi, and Tennessee, and of increasing the intrastate rates in Georgia, North Carolina, South Carolina, and Virginia. By order dated January 2, 1952, division 2 of this Commission instituted an investigation into the lawfulness of so-called uniform rates, but since the interstate and the intrastate rates of the Southern, including the Cincinnati, New Orleans & Texas Pacific, to and from points in Tennessee are on the same basis no further consideration will be given here to such rates. The other respondents insist, however, that they need and are entitled to the increases sought herein.

The Nashville, Chattanooga & St. Louis scale, which applies on all kinds of wood, ranges from 8 cents per cord higher to 76 cents per cord lower than the interstate pulpwood scale, and from 23 cents per cord higher to 14 cents per cord lower than the Roanoke Rapids pulpwood scale within Tennessee.

As a result of general increases authorized by us, including the increases authorized in Ex Parte Nos. 166 and 168, the cumulative total increase in the basic Roanoke Rapids scale of rates since March 27, 1938, is 81.5 percent on interstate movements of pulpwood in the South. Since that same date the increases permitted by the various State authorities in the South have resulted in cumulative increases in intrastate rates of 67.9 percent in Mississippi, 65 percent in Alabama, Florida, and Louisiana, 59.4 percent in Tennessee, 44 percent in Georgia, 32 percent in North Carolina, 31.9 percent in Virginia, and 19.9 percent in South Carolina. If the increases here sought are granted, the cumulative increase in Tennessee will become 73.3 percent. These figures, of course, do not take into consideration the so-called uniform scale of rates described in footnote 4 which have been established by various carriers.

A consumer of extract or acid wood and pulpwood with plants at Kingsport, Harriman, Nashville, and Knoxville, Tenn., and at Sylva, N. C., Bristol and Lynchburg, Va., and Brunswick and Macon, Ga., opposes the increases sought in the Tennessee intrastate rates on wood. The mill at Kingsport produces white paper in competition with another mill at Canton, N. C., which produces the same grade of paper. The other Tennessee mills produce pulpboard in competition with other producers in the South. In the manufacture of these products wood is the most important raw material used and moves in the greatest volume. About two cords of wood weighing from four to five tons are required to produce one ton of pulpboard. In 1950, the four mills in Tennessee consumed about 127,000 cords of wood. Of this amount only 29 percent moved over intrastate routes. One reason for this is that Tennessee is not a heavy producer of the low-grade wood used by paper mills. Another reason is that many intrastate shipments

require handling over joint-line routes at charges based on the combination of local rates.

The Tennessee intrastate rates per cord on pulpwood are compared by this protestant with the intrastate rates in North Carolina, South Carolina, and Georgia. As examples, from Erwin, Tenn., to Kingsport, 43 miles, the intrastate rate is 188 cents. From Ela, N. C., to Canton, 43 miles, the intrastate rate is 149 cents. From Tuggle, Va., to Lynchburg, 44 miles, the intrastate rate is 149 cents. From Ludowici, Ga., to Savannah, Ga., 46 miles, the intrastate rate is 163 cents, and from Pregnall, S. C., to Charleston, S. C., 42 miles, the intrastate rate is 135 cents. Intrastate rates per cord in Tennessee on extract or acid wood are compared with the intrastate rates in North Carolina and Virginia. As examples, from Elverton, Tenn., to Knoxville, 43 miles, the rate is 135 cents. From Ela to Canton, 43 miles, the rate is 103 cents, and from Tuggle to Lynchburg, 44 miles, the rate is 132 cents. These comparisons, however, do not take into consideration the recent changes in the rates on pulpwood made by the southern and other carriers. Moreover, it is noted that, with the exception of Knigsport and Nashville, all of the points at which this protestant maintains plants are served by the Southern.

Prior to the more recent general rate increases this protestant did not move any appreciable amount of wood to its Tennessee mills by motor truck. In 1950, it received approximately 2,200 cords of wood by truck at Knoxville, and from January 1 to February 15, 1951, about 1,500 cords were received by truck. It was anticipated that during the remainder of 1951, an additional 7,500 cords would be moved by truck to Knoxville. As indicated, however, Knoxville is served by the Southern which has recently reduced its interstate and intrastate rates on pulpwood and is not here seeking an increase in such rates.

A producer of charcoal, pig iron, and specialty foundry iron operates a large hardwood distillation plant at Lyle, Tenn., located on a branch line of the Nashville, Chattanooga & St. Louis about 12 miles south of its main line west of Nashville. By highway the plant is about 40 miles directly west of Nashville. The distillation plant uses

about 80 thousand cords of oak, maple, beech, gum, or other hard woods a year. This user of hardwood has found that it can get its wood delivered at the plant from the wood cutters by truck for the same cost as it has paid for movement from the forest to the rail head and rail movement thence to the plant. A witness for this producer was of the opinion that if the increases here sought had been in effect probably half of the shipments which moved by rail to its plant during the test period would have moved by truck.

As stated, all of the respondents except the Southern and the Cincinnati, New Orleans & Texas Pacific, contend that the increases sought in the Tennessee intrastate rates on wood would result in substantial increases in their revenues even though some of the traffic might be diverted to trucks. During the three-weeks test period, the Clinchfield, for example, transported to Kingsport 110 carloads of pulpwood over interstate routes and 67 carloads over intrastate routes. The record does not show the movement, if any, of wood to Kingsport by other means of transportation. If the increases sought had been applied on the 67 shipments, additional revenue in the amount of $600.24 would have been realized, and on a yearly basis the amount would have been $10,404.16.

Other commodities.—The record indicates that agricultural slag, fire and paving brick, and sand, other than common and shipped in closed cars, are not produced at points in Tennessee. Alfalfa meal is produced in the Tiptonville, Tenn., area and phosphate rock is produced in the Mount Pleasant, Tenn., area. The respondents, however, failed to show any movements of these commodities over intrastate routes in Tennessee. Consequently, they failed to show that an increase in the rates on these commodities would result in substantial increases in their revenues, or that there is any discrimination between the interstate and the intrastate rates thereon.

General discussion and conclusions.—The need of the railroads for additional revenue to meet increased expenses was the underlying basis for the increases authorized by us in Ex Parte Nos. 166 and 168, and the increased

expenses were not confined to interstate traffic, but were and are incurred also to intrastate traffic, including that in Tennessee. It was realized, of course, that the carriers would not be able in all instances to take full advantage of the increases authorized in those proceedings because of competitive or other peculiar conditions. This is demonstrated by the fact that the respondents have reduced the interstate and intrastate rates on coal to Nashville and the intrastate rates on coal to Old Hickory to a basis below that authorized by the Tennessee Commission because of competition with natural gas. The evidence is convincing, however, that the increases sought by the respondents on coal to other destinations in Tennessee and on chemical, acid, pulp, and fuel wood would result in substantial increased revenue which the respondents need to meet increased operating costs. The record indicates that the intrastate movement of such traffic is no less able to bear the increases sought than the interstate movement thereof from, to, and through Tennessee. To the extent that such intrastate traffic fails to bear its fair proportionate share of the increased operating expenses by providing additional revenue commensurate with that provided on such interstate traffic, it places an undue burden upon interstate commerce.

As to coal, the record also warrants the determination that some of the Tennessee intrastate rates unduly prefer certain shippers and localities in intrastate commerce to the undue disadvantage of and prejudice to other shippers and localities in interstate commerce.

We conclude that:

1. The conditions incident to the intrastate transportation of freight in Tennessee are not more favorable than those incident to the interstate transportation of freight between points in Tennessee and between Tennessee, on the one hand, and the adjoining States in southern territory, on the other.

2. The amounts and percentages by which interstate freight rates and charges between points in Tennessee and points in adjoining States were increased, as authorized in Ex Parte Nos. 166 and 168, are just and reasonable.

3. As to coal, there is active competition between persons

and localities engaged in interstate commerce between points in Tennessee and points in other States, on the one hand, and persons and localities engaged in intrastate commerce in Tennessee, on the other.

4. The intrastate rates and charges in Tennessee on chemical, acid, pulp, and fuel wood and on coal, except to Nashville and Old Hickory and intermediate points taking the same rates, are not contributing their fair share of the revenues required by the respondents to enable them to render adequate and efficient service and to operate profitably; are causing undue, unreasonable, and unjust discrimination against interstate commerce; and as to coal, with the exception noted, are causing undue preference of and advantage to persons and localities in intrastate commerce, and undue prejudice and disadvantage to persons and localities in interstate commerce.

5. The unjust discrimination and undue preference and prejudice herein found to exist should be removed by applying to the Tennessee intrastate rates and charges on the commodities described in finding 4 the same respective increases as authorized thereon in Ex Parte Nos. 166 and 168 which are and for the future may be maintained by the respondents on like interstate traffic between points in Tennessee and points in adjoining southern States; provided that no intrastate rate or charge on pulpwood shall be increased so that it will exceed the lowest level of the corresponding interstate rates on pulpwood maintained by the same carrier to or from Tennessee points.

6. The establishment of increases in intrastate rates and charges as provided in finding 5 will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, and will substantially increase the respondents' revenues.

7. The assailed rates and charges, except as appears from the foregoing findings with respect to coal and wood, are not shown to cause undue or unreasonable advantage, preference, or prejudice, or to cause undue, unreasonable, or unjust discrimination against interstate commerce.

These findings and conclusions are without prejudice to the right of the authorities of the State of Tennessee, or

any other interested party, to apply for a modification thereof as to any specific intrastate rate or charge affected thereby on the ground that such rate or charge is not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.

An order carrying into effect the foregoing findings and conclusions will be entered, unless we are notified by the Tennessee Commission, within 30 days from the date of the service of this report, that it will promptly permit the increases herein approved.

SPLAWN, *Commissioner*, dissenting in part:

I disagree with this report to the extent that it requires respondents to apply to the intrastate rates on coal and wood "the same respective increases as authorized thereon in Ex Parte Nos. 166 and 168 which are and for the future may be maintained by the respondents on like interstate traffic between points in Tennessee and points in adjoining southern States."

For reasons discussed below, these findings, in my judgment, disregard the well-settled principles: (a) that the power of this Commission under section 13(4) of the Act to require increases in intrastate rates is dominant only so far as necessary "to alter rates which injuriously affect interstate transportation" within the meaning of that section; and (b) that when, as here, the Federal power is exerted for the purpose of nullifying State-prescribed rates, the justification for the exercise of that power must clearly appear. *North Carolina* v. *United States*, 325 U. S. 507, 511, and the several cases there cited.

The finding that the present intrastate rates on coal result in undue prejudice and preference apparently rests upon the preliminary finding, immediately preceding the numbered findings, to the effect that *some* of the Tennessee intrastate rates unduly prefer *certain* shippers and localities in intrastate commerce. Neither the rates, the shippers, nor the localities which are involved in this stated unlawfulness are specifically identified. Such indefinite findings clearly do not justify the exercise of our power

under section 13(4) to require increases throughout the State of Tennessee. See *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 579, 580, and *Florida* v. *United States*, 282 U. S. 194. Presumably, therefore, this report relies primarily upon the finding of unjust discrimination against interstate commerce with respect to the rates on both coal and wood.

The findings of unjust discrimination against interstate commerce seem to rest mainly upon the need of respondents for additional revenue as disclosed in Ex Parte Nos. 166 and 168. Under the heading "General discussion and conclusions" this present report states that the increased expenses detailed in the Ex Parte proceedings were incurred on intrastate traffic in Tennessee as well as on interstate traffic, and the report then concludes that "the intrastate movement of such traffic is no less able to bear the increases sought than the interstate movement thereof from, to, and through Tennessee."

Contrary to the theory of this report, as I understand it, there is a clear distinction between our power to grant petitions of the railroads for general increases in their interstate rates based upon their judgment and expectations that increased revenues will result, and, on the other hand, our power under section 13(4) to overrule State authority and *require* precisely the same increases in the intrastate rates.

Our report in Ex Parte No. 168 (276 I. C. C. 9, 112) contains this statement:

> As previously shown, the cumulative effect of increases in rates already made and those now authorized may tend to diversion or suppression of traffic because exceeding the value of the service. The petitioners have represented that they are aware of this situation, and may be expected to protect their traffic and revenue therefrom by rate revisions necessary for the purpose.

It is protestants' contention, supported by adequate evidence I think, that the cumulative effect of the general increases reflected in the present intrastate rates has been to retard or prevent the movement of coal and wood, and that any further increases will result in substantially

greater diversion of this traffic from the rails because of competitive conditions peculiar to that State.

Coal deposits in Tennessee are widely scattered throughout the State. According to this record, there is keen competition between coal and other fuels, particularly natural gas at many points in Tennessee with the result that the delivered cost of coal, including the freight charges, often determines whether coal or some other fuel will be used. Additionally, there is keen competition for this traffic as between rail, truck, and barge transport agencies. These competitive conditions were partially recognized when respondents reduced their intrastate rates on coal from certain origins to Nashville and Old Hickory below the basis now authorized by the Tennessee Commission.

Apparently it is because of this action of respondents, that this report does not require any increases in the present intrastate rates on coal from any origins in Tennessee to Nashville and Old Hickory and intermediate points taking the same rates. But the report gives no satisfactory explanation of why other consuming destinations in Tennessee, similarly situated with respect to compelling competitive conditions, are not accorded the same rate treatment. For example, at the time of the hearing trucks were transporting about 100,000 tons of coal per year into Chattanooga and it was estimated that this movement by truck will be increased 50 percent as a result of the increases required by this report. In this connection, it is significant, I think, that this report contains no estimation of the increased revenue which respondents are expected to receive as a result of these increased intrastate rates on coal.

There is a well-established principle that carriers may not select from among their shippers those who are to be given an opportunity to ship in competition with other forms of transportation and those who are not. *Norcross Bros.* v. *Pennsylvania R. Co.*, 210 I. C. C. 629, 633, and 220 I. C. C. 407, 411. Our power to nullify State authority and require increases in intrastate rates should not be exercised so as to directly violate that principle, which is the result under the findings in this report.

Coming now to the finding that the present intrastate

rates in Tennessee on wood cause unjust discrimination against interstate commerce: As stated in footnote "4" in this report, effective November 1, 1951, many of the carriers in southern territory established a uniform scale of rates on pulpwood for application throughout that territory, on both interstate and intrastate traffic, including intrastate application in Tennessee over lines of the Southern and the Cincinnati, New Orleans & Texas Pacific. The stated purpose of this uniform scale was to prevent further diversion of traffic from the rails and to regain some of the traffic that had been lost to trucks.

This uniform scale, with broad application both interstate and intrastate throughout southern territory, is lower than the *present* intrastate rates in Tennessee over certain lines (excluding for example the Southern and the Cincinnati, New Orleans & Texas Pacific). If this uniform scale represents the predominating interstate rate level on pulpwood throughout the South, then the present rate situation in Tennessee, in instances where the intrastate rates in Tennessee are higher than the uniform scale, actually results in discrimination against intrastate commerce—not undue discrimination against interstate commerce as found in this report. The further increases in the present Tennessee intrastate rates required by these findings will widen the existing rate differences in favor of interstate commerce.

This report finds that the present intrastate rates on wood do not result in undue prejudice and preference as between persons and localities in interstate and intrastate commerce. But in correcting the stated unjust discrimination against interstate commerce, this report seems to approve two different intrastate rate levels on pulpwood in Tennessee. It is reasonable to believe that this will create, as between intrastate shippers, rate inequalities of the character prohibited by section 13(4) as between interstate and intrastate shippers. This results from requiring increases in Tennessee intrastate rates over certain lines which rates are already higher than the uniform scale that will continue in force (intrastate) over other lines in Tennessee, including

the Southern and the Cincinnati, New Orleans & Texas Pacific.

The fact that, for the purposes previouly indicated, many carriers in southern territory have established and now maintain rates on pulpwood that are lower than the present intrastate rates over certain lines in Tennessee fully substantiates protestants' evidence of record in this proceeding that the proposed increases in the present Tennessee intrastate rates on wood will not produce any substantial increase in respondents' revenues, but instead, probably will result in a decrease in their revenue from that traffic.

The conclusion of certain respondents, relied upon in this report, that the imposition of these increases on the intrastate transportation of coal and wood will not result in any substantial reduction in the volume of movement by rail, either by diversion to other forms of transport or by suppressing the movement, is not only contrary to the evidence before us by the principal shippers who actually control the routing of this intrastate traffic, but it is also directly contrary to the judgment of the Tennessee Commission entered after a full investigation of the transportation and competitive conditions prevailing throughout Tennessee.

The factual situation set out in this report, in my opinion, does not provide a sound legal basis for the exercise of our power under section 13(4) requiring any increases in the present Tennessee intrastate rates on either coal or wood.

Commissioner Aitchison did not participate in the disposition of this proceeding.

By the Commission.

W. P. BARTEL,
Secretary.

[SEAL.]

APPENDIX A

Commodity	Ex Parte 166 Interstate	Ex Parte 166 Intrastate	Ex Parte 168 Interstate in Addition to Rates Under Col. 2	Ex Parte 168 Intarstate in Addition to Rates Under Col. 3
(1)	(2)	(3)	(4)	(5)
Agricultural Limestone, ground or pulverized, in open top cars	25%, Max. 1½c 100 lbs.	10%, Max. 1½c 100 lbs.	10%	Made same as rates on road aggregates
Agricultural Limestone in closed cars or in open-top cars protected by tarpaulin or other protective covering	25%, Max. 3c 100 lbs.	10%, Max. 3c 100 lbs.	10%	10%
Agricultural Slag	25%, Max. 1½c 100 lbs.	10%, Max. 1½c 100 lbs.	10%	10%
Alfalfa Meal	25%	25%	10%	Rates reduced to 18½% of 1st class
Brick, fire or paving	25%, Max. 3c 100 lbs.	10%, Max. 3c 100 lbs.	10%	10%
Cement	25%, Max. 4c 100 lbs.	10%, Max. 4c 100 lbs.	10%	10%
Clay:				
In open-top cars not protected by tarpaulin or other protective covering	25%, Max. 1½c	10%, Max. 1½c	10%	10%
Inclosed cars or open-top cars protected by tarpaulin or other protective covering	25%, Max. 6c 100 lbs.	10%, Max. 6c 100 lbs.	10%	10%

APPENDIX A—Continued

Commodity	Ex Parte 166 Interstate	Ex Parte 166 Intrastate	Ex Parte 168 Interstate in Addition to Rates Under Col. 2	Ex Parte 168 Intrastate in Addition to Rates Under Col. 3
(1)	(2)	(3)	(4)	(5)
Coal	(20%, Max. 40c	10%, Max. 40c	10%	10%
Coke	(N. T. or 45c GT	N. T. or 45c GT	10%	10%
Fertilizer	25%, Max. 8c 100 lbs.	10%, Max. 8c 100 lbs.	10%	10%
Phosphate Rock	25%, Max. 5c 100 lbs.	25%, Max. 5c 100 lbs.	10%	....
Sand, except common	25%, Max. 3c 100 lbs.	10%, Max. 3c 100 lbs.	10%	10%
Wood: Chemical Acid Pulp Fuel	25%	15%	10%	10%
Switching charges on the above commodities except wood	25%	10%	10%	10%

Docket No. 30720

APPENDIX B

1947

Road	Value	Net Railway Operating Income	Rate of Return
Southern Railway	$ 622,426,300	$ 21,375,013	3.43%
CNO&TP	84,122,947	6,193,843	7.36%
I-C	542,292,808	24,318,396	4.48%
GM&O	194,502,068	6,876,002	3.54%
NC&StL	100,146,912	1,936,033	1.93%
L. & N. Railroad	415,510,532	16,280,657	3.92%
Tenn. Central	8,669,814	170,976*	.....
Total	$1,967,671,381	$ 76,808,968	3.90%

1948

Road	Value	Net Railway Operating Income	Rate of Return
Southern Ry.	$ 643,921,507	$ 29,148,740	4.53%
CNO&TP	78,582,193	8,327,292	10.60%
I-C	557,736,762	29,770,116	5.34%
GM&O	194,727,523	9,097,324	4.67%
NC&StL	103,332,725	2,932,666	2.84%
L. & N. Railroad	439,753,695	21,175,636	4.82%
Tenn. Central	8,624,500	29,152	0.34%
Total	$2,026,678,905	$100,480,926	4.96%

1949

Road	Value	Net Railway Operating Income	Rate of Return
Southern Ry.	$ 635,100,499	$ 21,863,820	3.44%
CNO&TP	76,527,029	6,224,560	8.13%
I-C	572,896,421	25,184,679	4.40%
GM&O	206,242,412	7,008,946	3.40%
NC&StL	112,390,311	3,422,130	3.04%
L. & N. Railroad	445,700,180	12,836,069	2.88%
Tenn. Central	10,010,091	404,253	4.04%
Total	$2,058,866,943	$ 76,944,457	3.74%

*Deficit

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 19th day of August, A. D. 1952.

No. 30720

TENNESSEE INTRASTATE RATES AND CHARGES

This proceeding having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission, on May 19, 1952, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and

It appearing, That as set forth in said report and in accordance with the practice in such proceedings, the Commission stated that an order carrying into effect the findings in said report would be entered, unless we were notified by the Tennessee Commission, within 30 days from June 4, 1952, the date of service of said report, that it would permit promptly the increases therein approved, and that no such notification has been made by the Tennessee Railroad and Public Utilities Commission:

It is ordered, That the respondents in this proceeding, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before Nov. 28, 1952, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to abstain, from practicing (1) the unjust discrimination against interstate commerce, and (2) the undue preference of and advantage to persons and localities in intrastate commerce, and undue prejudice and disadvantage to persons and localities in interstate commerce, found in said report to exist.

It is further ordered, That said respondents, according as they participate in the transportation, be, and they are hereby notified and required to establish, on or before Nov. 28, 1952, upon notice to this Commission and to the general

public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply for the intrastate transportation of freight from and to points in the State of Tennessee freight rates and charges which shall be no lower than the approved rates and charges, as provided in said report.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

W. P. BARTEL,
Secretary.

[SEAL.]

APPENDIX "C"

PERTINENT SECTIONS OF THE STATUTES INVOLVED

Interstate Commerce Act, 41 Stat. 484, as amended, 49 Stat. 543, as amended, 54 Stat. 911:

Sec. 13. . . .

(3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such

State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Interstate Commerce Act, 41 Stat. 488, as amended, 48 Stat. 220, as amended, 54 Stat. 912:

Sec. 15a. . . .

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the fur-

nishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

Administrative Procedure Act, 60 Stat. 241:

Sec. 7. . . .

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Administrative Procedure Act, 60 Stat. 242:

Sec. 8. . . .

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunty to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for

such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Administrative Procedure Act, 60 Stat. 243:

Sec. 10. . . .

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. ——

STATE OF TENNESSEE
RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, AND HAMMOND FOWLER, CAYCE PENTECOST, AND JOHN C. HAMMER, AS MEMBERS OF AND CONSTITUTING THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE
TENNESSEE VALLEY AUTHORITY - - - *Appellants*

v.

UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION
CAROLINA, CLINCHFIELD AND OHIO RAILWAY (LESSEES: ATLANTIC COAST LINE RAILROAD COMPANY AND LOUISVILLE & NASHVILLE RAILROAD COMPANY)
THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY
LOUISVILLE & NASHVILLE RAILROAD COMPANY
THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY
SOUTHERN RAILWAY COMPANY
GULF, MOBILE & OHIO RAILROAD COMPANY
ILLINOIS CENTRAL RAILROAD COMPANY
TENNESSEE CENTRAL RAILWAY COMPANY
STEARNS COAL & LUMBER COMPANY, INC.
KENTUCKY COAL AGENCY, INC. - - - *Appellees.*

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

STATEMENT

This brief is filed in opposition to separate motions to affirm of the Interstate Commerce Commission (hereinafter called "ICC") and the intervening railroads. The United States adopted a neutral position in the court below and has not moved to affirm.

For a statement of the issues presented by the appeal and the facts pertinent to the jurisdiction of the Court and the substantial nature of the issues, reference is made to appellants' jurisdictional statement. This brief supplements the jurisdictional statement to the extent necessary to reply to the motions to affirm. Since similar contentions are advanced in the two motions, a single brief is filed in opposition to both of them. The contentions as to pulpwood appear to us to be adequately covered in the jurisdictional statement and this brief is, therefore, addressed only to the contentions in the two motions with reference to coal.

ARGUMENT

I

THE DECISION IN KING v. UNITED STATES IS NOT CONTROLLING

The intervening railroads take the position that the case presented by this appeal "is on 'all-fours' with *King* v. *United States,* 344 U. S. 254." The position of the ICC is stated in less extreme language but appears to be substantially the same. We believe that this contention is fully answered in point 5 of our jurisdictional statement, under the heading "THE QUESTIONS ARE SUBSTANTIAL."

The major issues in this case as to coal are whether the ICC has authority to raise intrastate rates which are already higher and more remunerative than corresponding interstate rates, and whether it can avoid that question by failing to make a finding as to the relative level of rates when the issue is squarely presented to it on the record. No such issues were involved in the *King* case, *supra.* In that case, which involved commodities generally and not specific movements of only two commodities as here, the intrastate rates were concededly lower than the interstate rates.

We do not understand that the appellees are contending that the ICC has authority, under the guise of removing revenue discrimination against interstate commerce, to require that intrastate rates be raised above the interstate level. They seek to avoid this issue by contending (1) that the ICC was not required to make a finding as to the relative level of the interstate and intrastate rates, and (2) that its general findings 1, 2, 4, 5, and 6, taken together, are an adequate substitute for a specific finding on this issue. Irrespective of the merits of these contentions, they have no relationship to any issue presented or decided in the *King* case, *supra;* and the very fact that appellees' motions are largely devoted to these contentions demonstrates that the *King* case, *supra,* is not controlling.

We believe that both contentions are without merit, as hereinafter shown, and that the basic issues stated above, which are both new and of far-reaching importance, cannot be avoided.

II

THE INTERSTATE COMMERCE COMMISSION WAS REQUIRED BY SECTION 8(b) OF THE ADMINISTRATIVE PROCEDURE ACT TO MAKE A FINDING ON THE RELATIVE LEVELS OF THE INTERSTATE AND THE INTRASTATE RATES.

That the relative levels of interstate and intrastate rates on coal was a "material issue of fact . . . presented on the record" (Administrative Procedure Act, sec. 8(b), 60 Stat. 242, 5 U.S.C., sec. 1007(b)), is apparent from the discussion of the ICC at sheet 22 of its report (286 I.C.C. 41, 54) in which reference is made to the contention "that intrastate coal rates in Tennessee are generally as high as or higher than interstate coal rates, and that the going intrastate coal rates are more remunerative to the respondents than the interstate rates."

Both motions appear to contend that the ICC was not required to make a finding as to the relative levels of interstate and intrastate rates on coal on the ground that appellants, in their briefs in the ICC proceedings, did not specifically ask for findings on this issue. This contention is both highly technical and without foundation.

1. Subsection (e) of Rule 91 of the ICC's General Rules of Practice states that: "Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Commission to make" (49 Code Fed. Regs., sec. 1.91 (1949)). In contrast subsection (a) of Rule 96, which governs the filing of exceptions to the examiner's

report, provides, in part: "Exceptions to the officer's report with respect to statements of fact or matters of law must be specific and must be stated and numbered separately" (*id.*, sec. 1.96).

The use of the word "should" in Rule 91(e) and of "must" in Rule 96(a) seems clearly to indicate that the former is not mandatory.

2. The brief of appellant Tennessee Valley Authority substantially complied with the provisions of Rule 91(e). This brief, which is part of the record on this appeal, was preceded by a table of contents reading in part, under the heading "ARGUMENT":

Page

II. The Carriers Have Failed to Show a Disparity Between Interstate and Intrastate Rates on Bituminous Coal Which Favors the Intrastate Transportation of this Commodity 22

A. Intrastate rates on coal are as high as or higher than interstate rates for comparable distances on the same commodity 23

B. Intrastate coal rates already yield ton-mile and car-mile revenues which are almost double those yielded by interstate rates 35

C. Intrastate coal rates yield a greater margin above the cost of the service than do interstate rates on the same commodity and cannot be regarded as constituting a burden on interstate commerce 38

The brief ended with a summary of facts which appellant Tennessee Valley Authority contended had been established, reading in part:

> Intrastate coal rates in Tennessee cannot be repugnant to the provisions of sections 13 and 15(a) of the Interstate Commerce Act as alleged in the petition unless they are lower than going interstate rates on the same commodity. The record discloses that they are not lower than going interstate rates, either when compared on a mileage basis, or on a ton-mile and car-mile earnings basis, or on a margin-above-cost basis. The contrary is true. Mile for mile, intrastate rates on coal are generally as high as interstate rates. Ton-mile for ton-mile, and car-mile for car-mile, the carriers' earnings from intrastate coal traffic already exceed those from interstate traffic. And when margins above costs are compared, going intrastate coal rates are clearly more remunerative to the carriers than interstate rates.

3. Under ICC practice, briefs are filed after the hearing before the examiner and prior to the filing of his proposed report. The case is heard by the commissioners on exceptions to the examiner's proposed report and on replies to such exceptions. The exceptions filed by appellant Tennessee Valley Authority complied strictly with the requirements of Rule 96(a). Although the examiner's proposed report recommended that the ICC not require an increase in the intrastate rates on coal, it did not include a finding on the issue of the relative levels and remunerativeness of interstate and intrastate rates. To make sure that

it was preserving its contention on this issue, appellant Tennessee Valley Authority specifically excepted to the failure of the examiner to make such a finding, exception No. 5 of its exceptions to the proposed report (also a part of the present record) reading:

> The Examiner Erred in Failing to Find That the Evidence Does Not Establish the Existence of a Disparity Between Intrastate and Interstate Rates on Coal.

Following this exception, appears a supporting statement, reading in part:

> We submit that the record establishes another ground which supports the Examiner's conclusion, to-wit, that the respondents failed to show the existence of a disparity between intrastate and interstate rates on coal which favored the intrastate transportation of this commodity. On the contrary, the evidence adduced shows that whether the comparison is made on a mileage basis, on a ton-mile and car-mile revenue basis, or on a margin-above-cost-of-service basis, intrastate coal rates in Tennessee are as high as or higher than interstate rates on the same commodity. We believe the Examiner erred in failing so to find [Exceptions, p. 6] .

4. In their reply to the exceptions, the appellee railroads took issue with this exception but interposed no challenge to the appellant Tennessee Valley Authority's right to advance it.

5. That the ICC itself recognized that the issue was before it is shown by its discussion on sheet 22 of

its report (286 I.C.C. 41, 54), referred to at pages 11-13 of appellants' Statement as to Jurisdiction, of the contention of appellant Tennessee Valley Authority "that intrastate coal rates in Tennessee are generally as high as or higher than interstate coal rates, and that the going intrastate coal rates are more remunerative to the respondents than the interstate rates."

We submit that, in the light of the foregoing facts, the technical objection now interposed by appellees is without merit. Moreover, the advancement of such an objection by the ICC contradicts its own often repeated pronouncement, in which the courts have concurred, that hard and fast rules of pleading and practice do not prevail in proceedings before it and that technical defenses should not be permitted to defeat the meting out of the substantial justice contemplated by the Interstate Commerce Act. See *Ott Coal Co.* v. *Ann Arbor R.R.*, 253 I.C.C. 677, 681; *Northeast Kentucky Coal Bureau* v. *Chesapeake & O. Ry.*, 201 I.C.C. 165, 171; *Flour City S.S.Co.* v. *Lehigh Valley R.R.*, 24 I.C.C. 179, 187; *Keuka Lake Ice Co.* v. *Lehigh Valley R.R.*, 172 I.C.C. 493, 494; *Spiller* v. *Atchison, T. & S.F.Ry.*, 253 U. S. 117, 127, 131; *Chesapeake & O. Ry.* v. *United States*, 11 F.Supp. 588, 592 (S.D. W.Va.), *aff'd*, 296 U.S. 187.

III

NONE OF THE FINDINGS OF THE ICC ARE A SUBSTITUTE FOR THE NECESSARY FINDING THAT THE INTRASTATE RATES ARE ON A LOWER LEVEL THAN THE INTERSTATE RATES OR CONTRIBUTE A LESSER PROPORTIONATE SHARE TO THE REVENUE REQUIREMENTS OF THE CARRIERS

Both motions, after setting out the ICC's findings in full, argue that findings 1, 2, 4, 5, and 6 constitute an adequate substitute for the express finding as to the relative existing levels of interstate and intrastate rates which the ICC has failed to make. An analysis of these findings demonstrates the contrary.

Finding 1 is that

> The conditions incident to the intrastate transportation of freight in Tennessee are not more favorable than those incident to the interstate transportation of freight between points in Tennessee and between Tennessee, on the one hand, and the adjoining States in southern territory, on the other.

This finding, which relates to commodities generally and not to coal specifically, is irrelevant. It is not contended by appellants that it costs less to handle intrastate shipments of coal than it does to handle interstate shipments for the same distance, but rather that the intrastate rates are maintained on a higher level and, accordingly, return a greater percentage above the cost of handling the traffic.

Finding 2 is that the increases authorized on interstate traffic in Ex Parte Nos. 166 and 168 are just and reasonable. The relevancy of this finding to the issue

of comparative interstate and intrastate rates is not apparent.

Finding 4 is that the intrastate rates

> . . . are not contributing their fair share of the revenues required by the respondents to enable them to render adequate and efficient service and to operate profitably; are causing undue, unreasonable, and unjust discrimination against interstate commerce. . . .

This finding simply states the ultimate conclusion of the ICC and to have meaning in the context of this case would have to be supported by the very type of subsidiary finding for which appellees contend it is a substitute. It is entirely possible that the ICC might conclude that even though intrastate rates are higher and more remunerative than the interstate rates, they are nevertheless not contributing their fair share of the revenue requirements of the carriers. That this may have been the ICC's view is highlighted by the fact that this finding is taken almost verbatim from finding 5 in the order involved in the *King* case (344 U.S. 254, 268 (fn. 13)), but that the significant words "are abnormally low" which appeared in that finding were omitted from this one. It is also highlighted by the statement at sheet 22 (286 I.C.C. 41, 54) that appellants did not *conclusively* prove that the intrastate rates were higher and more remunerative.

Finding 5 simply requires that the unjust discrimination referred to in finding 4 be removed by applying to intrastate traffic so much of the increases authorized

in Ex Parte Nos. 166 and 168 as the carriers maintain in effect on interstate commerce.

Finding 6 is that

> The establishment of increases in intrastate rates and charges as provided in finding 5 will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, and will substantially increase the respondents' revenues.

This finding not merely fails to meet the issue but epitomizes a fundamental vice inherent in both the evidence presented by the railroads in this case and the ICC's order. There is a wide zone of reasonableness within which rates may vary without being unlawful, rates at the upper edge of the zone being commonly described as maximum reasonable rates and those at the lower edge as minimum reasonable rates. *United States* v. *Chicago, M., St. P & P.R.R.*, 294 U.S. 499, 506; *Texas & Pacific Ry.* v. *United States*, 289 U.S. 627, 636; *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 460-461. When this case was heard, appellants presented detailed evidence that the existing level of Tennessee intrastate coal rates was higher and more remunerative to the railroads than the *actual, going level* of interstate rates. The railroads, on the other hand, directed their efforts to showing that the Tennessee intrastate rates were below the level of various interstate rates approved over the years by the ICC for application as *maximum reasonable rates* (see discussion of their evidence, *infra*, pp. 18-22). But, as one of

the railroads' own witnesses freely admitted (Tr. 109-110), the going level of interstate coal rates in the South is below the maximum reasonable level. Hence, Tennessee intrastate rates may at the same time be below the maximum reasonable interstate level, and above the actual interstate level. Indeed, this is precisely the situation, as the proof shows (*infra*, pp. 16-18, 20-21). The ICC's finding 6 is simply that the intrastate rates, if increased as proposed, would not exceed the upper limits of the zone of reasonableness.

The ICC has frequently held that a mere difference in the level of rates does not make the relationship between them unlawful. E.g., *A. C. Jensen Block & Supply Co.* v. *Chicago, M., St. P. & P.R.R.*, 273 I.C.C. 399, 401; *Silverton Supply Co.* v. *Chesapeake & O.Ry.*, 273 I.C.C. 382, 387-388; *Waterloo Fruit & Comm. Co.* v. *Illinois Central R.R.*, 243 I.C.C. 271, 272. Consequently, the Tennessee intrastate rates could be increased above the interstate rates and still be within the zone of reasonableness and "not . . . unreasonable in relation to interstate rates" (finding 6). It follows that the ICC's finding, contrary to appellees' contention, does not say or even imply that the intrastate rates are presently lower than the interstate rates or will not become higher than the interstate rates if the ICC's order is allowed to stand.

In addition to the ICC's numbered findings, there is a statement on sheet 22 of its report (286 I.C.C. 41, 54), referred to in the motion of the intervening railroads, to the effect that since the ICC's decision in the Southern Class Rate Investigation in 1925, the rail-

roads have followed a policy of maintaining interstate and intrastate rates on the same level on practically all commodities, the exceptions in Tennessee being due to the failure of the Tennessee Railroad and Public Utilities Commission (hereinafter called "Tennessee Commission") to permit intrastate rates on some commodities to be increased to the full extent as interstate rates. As hereinafter pointed out (*infra*, pp. 23-25), this statement has no substantial support in the evidence. Moreover, a finding—if a statement appearing in a lengthy and uncritical summary of the evidence is entitled to be considered as a finding—as to the general policy of the railroads over a period of 25 years with reference to commodities generally is no substitute for a finding as to the relative levels of interstate and intrastate coal rates at a specific time when the relative level of such rates is put in issue.

Faced with the basic issue of the relative levels and remunerativeness of interstate and intrastate rates on coal, the ICC has avoided the issue instead of meeting it. Whether the existing intrastate rates on coal are higher or lower than the interstate rates is a simple question of fact which can be answered in plain language. The parties and the courts are entitled to an unequivocal finding on it so that the courts can determine whether the statutory standards have been correctly applied. The ICC should not be able to retreat behind vague, general findings as it has attempted to do in this case. See *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 488-489; *United States* v. *Chicago, M., St. P. & P.R.R.*, 294 U.S. 499, 510-511.

The argument advanced in the motions appears to be not so much that the foregoing findings have any real bearing on the relative levels of interstate and intrastate rates, but rather that these findings must be adequate because they are almost identical with those approved by this Court in *King* v. *United States,* 344 U.S. 254. This argument only serves to demonstrate the inadequacy of the findings in this case. The concept of due process as applied to administrative proceedings, and as codified in the Administrative Procedure Act, is that the administrative tribunal must in each case consider the specific issues involved and the evidence in the record relating thereto, and prepare findings particularly directed to and covering each such issue. That the ICC has adopted wholesale the findings from another and dissimilar case instead of making findings as to the facts at issue in this case raises a serious question as to the extent to which it gave consideration to the record in the case. If the ICC can avoid judicial review of its decisions by simply incorporating the findings approved by this Court in a different and dissimilar case, and such findings are thus to become as standardized as leases or insurance policies even though the issues before the ICC for decision are not so standardized, the provisions for a judicial review in the Administrative Procedure Act will be completely emasculated and such review, in the language of this Court in *United States* v. *Carolina Carriers Corp.,* 315 U.S. 475, 489, "has indeed become a perfunctory process." The record in this case consists of 725 pages of transcript and 85 exhibits. The

hearing occupied three days and two evenings. The record is largely occupied with transportation problems and conditions native to Tennessee and with the relative levels of Tennessee intrastate rates and interstate rates. The hearing was pointless if it culminates in a group of general standardized findings transferred bodily to a case involving a basic issue as to relative existing interstate and intrastate rates from another Section 13 case which involved no such issue.

IV

THERE IS NO SUBSTANTIAL EVIDENCE WHICH WOULD SUPPORT A FINDING THAT THE INTRASTATE RATES ON COAL WERE LOWER OR LESS REMUNERATIVE THAN THE INTERSTATE RATES

The question of substantial evidence is reached on these motions only if the Court should decide that the ICC's report contains findings on the relative level of interstate and intrastate rates which are clearly adequate. Without a full printed record, it is possible only to summarize the basic questions involved in this issue.

Because rates covering movements of coal within the South are not based on distance scales,[1] it is possible

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[1]That the rates on coal in the South are not based on distance scales is undisputed. The railroads' motion suggests, however, that they are indirectly related to mileage scales, stating that "a mileage scale is generally used in arriving at the rates from the base groups" (p. 10). We find no support in the record for this statement. The only mileage scales mentioned in the record are the Anderson and Carolina scales which were not prescribed as scales but merely used as a guide in prescribing maximum reasonable rates for a few specific movements and which are higher than the going interstate rates in Southern Territory, *infra*, pp. 22-23.

to make a valid comparison of the relative levels of interstate and intrastate rates only by examining representative samples of interstate and intrastate rates actually being charged and comparing the results in terms of: (1) Rates applicable to movements over comparable distances; (2) revenues returned by the interstate and intrastate rates, respectively, per car-mile and per ton-mile; and (3) margins which the interstate and intrastate rates return above cost.

Appellants introduced all three types of evidence in support of their contention that intrastate rates on coal were already higher and more remunerative than the interstate rates. They showed that representative intrastate rates were higher mile for mile than representative interstate rates (Ex. 60, pp. 7-24, Tr. 653); that they return greater revenue per car-mile and per ton-mile (Ex. 60, pp. 1-3, Tr. 653); and that they return a higher margin above cost (Ex. 62, Tr. 681; Ex. 63, Tr. 682). The railroads offered no cost evidence and no revenue comparisons; the only rate comparisons offered by them are found in witness Keubert's exhibits 5, 6, and 7 (Tr. 120), which support appellants' contentions. Exhibit 5, for example, compares 12 actual intrastate movements of coal with 17 interstate coal movements to the same destinations but from different origins. For eight of the intrastate movements, corresponding interstate movements for comparable distances are

shown.[2] The rates applicable to five of these intrastate movements are higher than the comparable interstate rates. Two are lower than the interstate rate but become higher if the order in this case is allowed to stand. The remaining one is lower than the comparable intrastate rate and will be on the same level if this order is allowed to stand. The comparisons, grouped according to similar distances, are shown in the following table compiled from Exhibit 5:

Interstate Rates		Intrastate Rates		
Distance (miles)	Interstate Rate (cents)	Distance (miles)	Intrastate Rate (cents)	Intrastate Rate With Interstate Increases (cents)
87	183	80	200	218
116	183	95	206	224
125	183	97	206	224
		117	206	224
169	275	169	267	287
		170	254	275
182	286	186	274	293
290	305	264	348	360

Exhibit 6 is a further comparison of interstate and intrastate rates. The intrastate rates shown in this exhibit of $2.00 for 80 miles and $2.06 for distances of

[2]No interstate rates are shown for distances as low as 60, 62, and 76 miles, as to which intrastate rates of $1.34, $1.93, and $1.60 respectively are shown; however, the $1.93 rate for 62 miles can be compared with the interstate rate of $1.83 for distances up to 125 miles. The intrastate rate of $1.60 shown for a distance of 103 miles is a special rate on small sizes of coal known as steam coal. It is somewhat lower than the $1.74 interstate rate on steam coal shown for 87 miles; however, it appears from lines 32 and 33, sheet 1 of Exhibit 5, that this rate probably applies for distances of 116 and 125 miles also.

95, 97, and 117 miles may be compared with the rate of $2.00 for 113 miles from the Louisville & Nashville Railroad West Kentucky mines to Nashville (erroneously shown on the exhibit as $2.24; Tr. 128). Exhibit 7 is discussed, *infra* pp. 20-21.

As pointed out in our jurisdictional statement (page 12, fn. 16), application of cost scales to a composite of the movements shown in Exhibits 5, 6, and 7, shows that on the average the rates on the intrastate movements listed therein return a higher percentage above cost than do the rates on the interstate movements.

The railroads tried this case before the ICC, and the motions to affirm filed by the ICC and the intervening railroads treat the case now, as though the issue were one involving the prescription of maximum reasonable rates by the ICC. The determination of what constitutes a maximum reasonable intrastate rate is the function of the Tennessee Commission. The jurisdiction of the ICC is reached only when the Tennessee Commission prescribes a rate that imposes a burden on interstate commerce.

As already pointed out, *supra*, p. 11, there is a wide zone of reasonableness within which railroads have managerial discretion as to the level of rates to be charged. A maximum reasonable rate represents the top limit beyond which they cannot go. If interstate rates on coal in the South were maintained on a maximum reasonable basis, the railroads would be justified in comparing intrastate rates with maximum reasonable rates; but where, as here, the interstate rates are

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below the maximum reasonable level, a comparison of actual intrastate rates with the present day equivalent of maximum reasonable rates authorized by the ICC at some time in the past is a comparison of totally unlike things.

The absence of any substantial evidence in the record that intrastate rates without the increases are lower than interstate rates with the increases is shown by the material cited in the two motions to affirm for the proposition that the record contains such evidence. The ICC relies on portions of the ICC's report (286 I.C.C. 41, 47-51); on pages 240-253, 300-302, and 474-478 of the transcript; and on "Exhibit 7, page 9, Exhibit 11."[3] None of these references support the ICC's position.

The pages of the ICC's report referred to relate to competitive conditions and the effects of the present rate adjustment on competitive situations in certain specific instances, and have no bearing on the general levels of interstate and intrastate rates. This is equally true of the testimony on the cited pages of the transcript.

Exhibit 11 reflects again the consistent confusion in appellees' motions between actual and maximum reasonable rates. It compares existing Tennessee intrastate rates, not with going interstate rates, but with rates prescribed or approved by the ICC in a number of cases as maximum reasonable rates. There is no showing that the rates are actually in effect or move

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[3]There is no page 9 in either Exhibit 7 or Exhibit 11 (Tr. 120).

any coal, and the railroads' own evidence shows that they are above the level of presently applicable rates which do move coal. Included, incidentally, are rates authorized for application in such non-Southern Territory states as Illinois, Missouri, Indiana, Iowa, Ohio, and New York.[4]

The only evidence relevant to the issues that is cited by the ICC in its motion is Exhibit 7 which compares a single intrastate movement of coal (from Newcomb to Conasauga, Tennessee, to which a rate of $2.81 applied for a distance of 151 miles) with a number of interstate movements, a great many of which moved greater distances at lower rates or rates slightly higher. A few examples are found in the following table compiled from Exhibit 7:

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[4]That Exhibit 11 was not thought by the witness who introduced it to have any bearing on the relative level of interstate and intrastate rates is shown by his testimony on cross-examination:

"As I testified yesterday, these are rates, on the right-hand side, prescribed by the ICC and are presented here to show that the proposed rates for intrastate application, that the carriers are now asking the ICC to approve, are certainly within the reasonable limits of reasonable rates as shown by interstate movements prescribed by the Commission, as cited" (Tr. 305).

Intrastate Movement			Interstate Movements			
Sheet	Distance (miles)	Rate (cents)	Sheet	Line	Distance (miles)	Rate (cents)
2	151	281	3	2	141	238
			4	14	153	259
			4	10	155	231
			4	6	162	275
			3	1	177	189
			3	18	185	231
			2	41	208	244
			4	7	213	294
			3	36	217	297
			2	28	238	257
			4	11	249	244
			2	35	307	299
			3	27	335	299

This Exhibit, as well as Exhibits 5 and 6, discussed *supra*, pp. 16-18, fully supports appellants' position.

The intervening railroads placed major reliance on a table appearing at page 12 of their typed motion, which purports to compare intrastate with interstate rates from the Lake City, Tennessee, group to 11 destinations. They assert that the compared "rates" "completely refute appellants' contention with respect to the relative level of the interstate and intrastate rates." In fact, this table has no relation to the relative levels of interstate and intrastate rates.

Column A of this table shows the intrastate rates from Lake City, Tennessee, to various points in Tennessee prescribed by the Tennessee Commission. These are actual rates for actual intrastate movements.

Column B shows what the rates become if the ICC's order in this case is allowed to stand. On the other hand, the figures shown in columns C and D which appear under the heading "Interstate Rates" are not rates applicable from Lake City to the destinations shown and, in fact, are not rates at all. What the railroads have done in these columns is to construct hypothetical rates based upon two cases in which the ICC authorized the use of a scale as a guide for determining maximum reasonable rates from specific origins to specific destinations. In column D they have taken the scale used by the ICC in *Anderson Bros. & Foster* v. *Alabama Central R.R.*, 206 I.C.C. 175,[5] constructed hypothetical rates for the distances shown on the basis of the scale, and then added all general increases since the date of the decision. In column C they followed the same procedure with the scale used by the ICC as a guide in fixing maximum reasonable rates to destinations in the Carolinas for distances beginning at 120 miles in *Carolina Coal Consumers Conference* v. *Aberdeen & Rockfish R.R.*, 270 I.C.C. 291.

The traffic witness for the Nashville, Chattanooga & St. Louis Railway testified that interstate coal rates in Southern Territory generally are well below the Anderson scale, which is the basis of the figures shown in column D and is lower than the Carolina scale, and

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[5]The scale provides for a progression of 10 cents for each 20 miles difference in distance, beginning at 120 miles. In preparing their table the railroads have assumed that the rate of progression for distances over 120 miles can be used as a rate of retrogression back to 50 miles. There is no basis for this assumption, even if their use of the scale could otherwise be defended.

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that he doubted if his railroad would try to apply either the Anderson or Carolina scale to movements on its line if it had the authority to do so (Tr. 109-110). Since the "interstate rates" shown in columns C and D are not rates at all and are higher than the going level of interstate rates which are presently moving the traffic, they are irrelevant to the issue of relative levels of the rates at which interstate and intrastate traffic actually moves.

The motion of the intervening railroads relies also on the statement in the ICC's report (Sheet 22, 286 I.C.C. 41, 54), that the railroads have followed the policy of maintaining interstate and intrastate rates on the same level and that the exceptions in Tennessee are due to the refusal of the state commission to permit intrastate rates to be increased to the same extent as interstate rates. This statement is taken from general language in the testimony of two of the railroad officials which is unsupported by any factual evidence in the record.

The testimony of W. K. Tate, Vice President of the Nashville, Chattanooga & St. Louis Railway, contains the following:

> Q. Generally speaking, Mr. Tate, are the interstate class and commodity rates within Southern Territory on the same level as the intrastate class and commodity rates within Tennessee?
>
> A. Generally speaking they are.
>
> Q. When changes are made in the interstate class and commodity rates within Southern Ter-

ritory are like changes usually made in the intrastate class and commodity rates within Tennessee?

A. They are [Tr. 8].

J. E. Kuebert, a traffic witness for the Louisville & Nashville Railroad, testified:

Exhibit No. 15 shows class rate levels in Southern territory beginning with January 15, 1928. That is the date of the revision of class rates within Southern Territory, as the result of the Commission's decision in No. 13494. As a result of this decision the rates throughout Southern Territory were placed on a uniform level, that is with the exception of Florida. Florida was given an arbitrary in addition.

* * *

. . . Following this decision of the Commission in 13494 the carriers filed petitions with the various State Commissions and asked that they be permitted to apply the same level of rates on intrastate traffic. It is my recollection that all the states, including Tennessee, granted that. As a matter of fact, I am sure Tennessee did, and in the Tennessee decision at that time commented on the fact they thought it was a good thing, for the carriers, putting the rates on a uniform level, and the shippers also came in and said they thought it was a good thing that the rates be on a uniform level. So, following that decision, why the carriers took up the revision of the various commodities, and they did the same thing on the commodities they did to class rates and adopted a uniform level of rates on practically all the

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> commodities throughout Southern Territory, the only exception being some few commodities here and there in some Southern State that failed to go and authorize the new level of rates [Tr. 132-134].

Mr. Tate's testimony was pure generalization. That it cannot be considered applicable to particular commodities is established by his admission that he did not know whether the interstate rates on some of the commodities given special treatment by the Tennessee Commission were in fact lower than the intrastate rates (Tr. 9-10). Mr. Kuebert's testimony is a generalization, unsupported by any facts, as to what the carriers did immediately following the Southern Class Rate decision in 1928, more than 20 years before the present case was heard. Any possible implication from this testimony that a uniform level of rates on coal was then established, and should be presumed still to continue, is destroyed by the testimony of another of the railroads' witnesses that

> . . . there have been a great many changes in the rates on coal and coke since 162, 166 and 168 . . . and we make changes in rates every day. They are not static, you know [Tr. 103].

Both motions criticize the cost testimony on which appellants rely and contend that it should be ignored. The criticisms made by the ICC in its report are discussed in appellants' jurisdictional statement. The other criticisms of the cost study contained in the motions relate to the basic philosophy underlying the

use of Rail Form A to determine average costs. The principal criticism relates to the use of Rail Form A costs to determine the average cost of handling a particular commodity. The ICC has accepted Rail Form A as valid for this purpose in other cases (see, for example, *International Minerals and Chemical Corp.* v. *Atlantic Coast Line R.R.*, 269 I.C.C. 611), and has accepted it as valid in this case, subject only to the criticisms of the underlying data to which it was applied.

The railroads' motion suggests that the ICC should ignore the cost testimony on the ground that "cost is by no means the controlling factor in rate making" (p. 13). The appellees' assertion is correct as an abstract principle but it is irrelevant to the issues involved in this case. The rate making function of the ICC does not come into play unless and until it is established that a discrimination against interstate commerce exists. We submit that if the intrastate rates are in fact returning a greater margin above costs than the interstate rates, the ICC is without jurisdiction to require that they be further raised and on this issue the cost evidence is controlling. *Cf., Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567.

As pointed out in our jurisdictional statement, appellants used the best information available to them to present proof on this issue as to which the burden was on the railroads. The railroads have complete data as to the interstate and intrastate movements of coal over their lines and it was thus possible for them, by use of the ICC's Rail Forms B and C, to prepare

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a study which would give the exact cost of specific interstate and intrastate movements, individually and in total (Tr. 695). They have not chosen to present such testimony and appellants are entitled to the presumption that had it been presented it would have been adverse to their contentions (*Interstate Circuit* v. *United States,* 306 U.S. 208, 226). Rail Form A has been accepted by the ICC in prior cases, and no one but the railroads is in a position to use Rail Form B or Rail Form C because only the railroads have the information necessary to complete them. The contention that appellants' cost study should be ignored is thus a contention that no cost study should be considered except one which only the railroads can make and which they have elected not to offer.

To summarize, therefore, appellants established by cost testimony, comparisons of going interstate and intrastate rates, and comparisons of ton-mile and car-mile earnings, that intrastate coal rates are already higher than the interstate rates. Opposed to this detailed and substantial evidence is irrelevant testimony as to maximum reasonable rates and vague generalizations unsupported by proof.

We submit that neither the testimony as to maximum reasonable rates nor the generalizations constitute substantial evidence that the intrastate rates on coal are on a lower level than the interstate rates and that a finding that they are on a lower level, had one been made, would not be supported by substantial

evidence on the whole record (Administrative Procedure Act, sec. 10(e), 60 Stat. 243-244, 5 U.S.C. sec. 1009(e)); *cf., Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474.

V

THERE IS NO ADEQUATE FINDING AS TO PERSONS AND LOCALITIES PREFERENCE AND PREJUDICE

The ICC's statewide order in this case, in so far as it rests on alleged preference and prejudice as between persons and localities in intrastate and interstate commerce, is based solely on a finding that "some of the Tennessee intrastate rates unduly prefer certain shippers and localities." This is no finding at all. There is no indication as to the rates, shippers or localities involved, nor as to whether the alleged instances of discrimination are few or many.

Both appellees apparently recognize that this so-called finding will not sustain the order, and accordingly attempt in their motions to rewrite it. Specifically, they suggest that the ICC really intended to say, and the finding should be read as though it did say, that all of the Tennessee intrastate rates unduly prefer all intrastate shippers and localities, except that the intrastate rates to Nashville, Old Hickory and intermediate points taking the same rates do not prefer intrastate shippers and localities shipping coal to those destinations.

Neither the courts nor the parties should be required to guess at what the ICC meant. In the present case the Court is being asked not merely to interpret

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ambiguous language in order to select one of several possible meanings, but to read into language a meaning which cannot be derived from the words which the ICC actually employed. An ICC order, and particularly one representing an exercise of its extraordinary jurisdiction under section 13(4) of the Interstate Commerce Act,[6] should be based on findings sufficiently clear so as not to require assumptions or interpretations of any kind. *Cf., United States* v. *Carolina Carriers Corp.*, 315 U.S. 475; *United States* v. *Chicago, M., St. P. & P.R.R.*, 294 U.S. 499.

A logical place to look for the interpretation of a doubtful finding in the ICC's report is in the opinion of the dissenting commissioner, who presumably participated in the Commission's discussion of the case and knew the basis on which the Commission's majority was proceeding. Commissioner Splawn's dissenting opinion shows that he did not construe the finding in the manner now contended for by appellees. His opinion reflects a Commission understanding that this finding means no more than it says. It provides no basis for an assumption that the ICC, even in its executive sessions, ever identified the places, shippers, and localities allegedly preferred or discriminated against.

> The finding that the present intrastate rates on coal result in undue prejudice and preference apparently rests upon the preliminary finding, immediately preceding the numbered findings, to the effect that *some* of the Tennessee intrastate rates unduly prefer *certain* shippers and localities in

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[6] 41 Stat. 484, as amended, 49 Stat. 543, as amended, 54 Stat. 911, 49 U.S.C. sec. 13(4).

intrastate commerce. Neither the rates, the shippers, nor the localities which are involved in this stated unlawfulness are specifically identified. Such indefinite findings clearly do not justify the exercise of our power under section 13(4) to require increases throughout the State of Tennessee. See *Wisconsin R. Comm.* v. *Chicago B. & Q.R.Co.*, 257 U.S. 563, 579, 580, and *Florida* v. *United States*, 282 U.S. 194. Presumably, therefore, this report relies primarily upon the finding of unjust discrimination against interstate commerce with respect to the rates on both coal and wood [Dissenting opinion, Report, sheet 33, 286 I.C.C. 41, 60-61].

Both motions cite *Georgia Comm.* v. *United States*, 283 U.S. 765, as sustaining the ICC's finding and order in this case relating to persons and places discrimination. The *Georgia* case involved a refusal of the Georgia Commission to permit the intrastate application of a mileage scale on chert, clay, sand, and gravel which had been prescribed by the ICC for interstate application.[7] Instead, the Georgia Commission required the railroads to fix intrastate rates in accordance with a lower mileage scale prescribed by it. The Court upheld an ICC order finding statewide preference and prejudice on the basis of typical instances in which discrimination resulted.

The case is distinguishable from the present case in two respects. In the first place, the finding of discrimination was based on the existence of intrastate rates

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[7] A similar situation was involved in *Louisiana Public Service Comm.* v. *Texas & N.O.R.R.*, 284 U.S. 125, also relied on by appellees.

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which were unquestionably lower than interstate rates for comparable distances. In the second place, the statewide order was sustained on the basis of typical instances. There is no finding in the present case of persons and places discrimination at any particular locations; neither is there a finding that the unspecified intrastate rates included in the finding that "*some* of the Tennessee intrastate rates unduly prefer *certain* shippers and localities" (emphasis supplied), are typical of the situation which exists throughout the state. A statewide order on the basis of typical instances arising out of the failure to apply to intrastate movements a distance scale prescribed for interstate movements is one thing; a statewide order on the basis of unspecified situations with reference to coal is quite another. This record abundantly establishes that neither the interstate nor the intrastate rates on coal are uniform for given distances, that such rates change from day to day, and that the competitive situations at the various marketing points in Tennessee vary widely. Since neither interstate nor intrastate coal rates are governed by distance scales, the existence of rates which prefer intrastate shippers at some points is in no way inconsistent with the existence of other rates which prefer interstate shippers at most points. The only substantial evidence is that the general level of the intrastate rates exceeds that of the interstate rates. The cases cited by appellees are thus wholly inapposite.

CONCLUSION

As outlined in appellants' jurisdictional statement, the appeal presents novel and substantial questions of great importance. It is respectfully submitted that the motions to affirm should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 393

STATE OF TENNESSEE, RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, AND HAMMOND FOWLER, CAYCE PENTECOST, AND JOHN C. HAMMER, AS MEMBERS OF AND CONSTITUTING THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

MOTION OF THE INTERSTATE COMMERCE COMMISSION TO AFFIRM

Appellee, Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, moves that the judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree entered on July 31, 1953, by a specially constituted district court of three judges established pursuant to 28 U. S. C., Sections 2284 and 2385, dismissing appellants' complaint seek-

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ing to set aside an order of the Interstate Commerce Commission, hereinafter called the Commission. Appeal was allowed on September 2, 1953, and the appeal papers were served on September 3, 1953.

The Commission's order, entered August 19, 1952, in No. 30720, *Tennessee Intrastate Rates and Charges*, 286 I. C. C. 41, under the authority conferred upon it by Sections 13 (3) and (4) and 15a (2) of the Interstate Commerce Act (49 U. S. C. 13 (3) and (4) and 15a (2)), requires the railroads operating in Tennessee to increase their rates for the intrastate transportation of wood and of coal, except to Nashville and Old Hickory and intermediate points taking the same rates, by applying "the same respective increases as authorized thereon in Ex Parte Nos. 166 and 168 which are and for the future may be maintained by respondents [rail carriers] on like interstate traffic between points in Tennessee and points in adjoining southern States." These proceedings were general revenue cases in which the railroads throughout the United States were authorized to increase their freight rates and charges to meet greatly increased operating expenses.

The authority of the Commission to require intrastate rates to be increased to remove discrimination and preference and prejudice is well settled

The Interstate Commerce Act (Section 13 (4)) confers authority upon the Commission to regu-

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late intrastate rates charged by interstate carriers where those rates cause (1) "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand," or (2) "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce." Section 13 orders removing discriminations caused by intrastate rates repeatedly have been sustained by this Court.[1]

In *King* v. *United States*, 344 U. S. 254, decided less than nine months ago, this Court upheld an order of the Commission under Section 13 (4) requiring the Florida intrastate rates to be increased by the amounts of the Ex Parte 162 and

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[1] *Wisconsin Railroad Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591; *Georgia Commission* v. *United States*, 283 U. S. 765; *Louisiana Commission* v. *United States*, 284 U. S. 125; *Louisiana* v. *United States*, 290 U. S. 70; *Florida* v. *United States*, 292 U. S. 1; *Illinois Commerce Commission* v. *United States*, 292 U. S. 474; *Ohio* v. *United States*, 292 U. S. 498; *Mississippi* v. *United States*, 307 U. S. 610; *Texas* v. *United States*, 337 U. S. 911; *New York* v. *United States*, 98 F. Supp. 855, aff'd per curiam 342 U. S. 882; *King* v. *United States*, 344 U. S. 254. See footnote 7 of the *King* decision, p. 259, where the Supreme Court vacated the judgment of the three-judge court in *Montana* v. *United States*, 16 F. Supp. 778 (setting aside a Thirteenth Section order of the Commission) and remanding the case for further consideration. The Montana Court on further consideration sustained the Commission's order (Civil Action No. 586, U. S. D. C., Dist. of Montana, decided June 23, 1953, not yet reported).

Ex Parte 166 increases. The Court discussed at length the findings necessary to support the Commission's order in cases of this kind. The findings there held sufficient, set out in footnote 13, and a comparison of those findings with the findings in the case at bar, leave no doubt of the adequacy of the latter findings. This Court's decision in the case of *United States* v. *Louisiana*, 290 U. S. 70, also makes it apparent that the findings here are adequate.

The Commission's findings adopted by the Court and the Court's conclusions of law

The court below adopted the findings of the Commission, found that they were "supported by substantial evidence on the record as a whole," referred to the evidence supporting the findings, and upheld the Commission's order. We quote below the findings of the Commission upheld by the Court, its references to the evidence supporting these findings and its conclusions of law:

> The Court adopts the following findings of the Interstate Commerce Commission, all of which findings are supported by substantial evidence:
>
> 9.1. The conditions incident to the intrastate transportation of freight in Tennessee are not more favorable than those incident to the interstate transportation of freight between points in Tennessee and between Tennessee, on the other hand, and the adjoining States in southern territory, on the other.

This finding of the Commission is supported by the evidence (Tr. 32–56), and by many previous decisions of the Commission, among which are, Southern Class Rate Investigation, 100 I. C. C. 513, 623; Southern Cement Rates, 132 I. C. C. 427, 455; Sand, Gravel, Slag, Stone and Chert, 165 I. C. C. 731; Increases in Tennessee Freight Rates and Charges, 272 I. C. C. 625, 646.

10.2. The amounts and percentages by which interstate freight rates and charges between points in Tennessee and points in adjoining States were increased, as authorized in Ex Parte Nos. 166 and 168, are just and reasonable.

Finding No. 2 is substantially the same as the finding made in Ex Parte No. 166, Increased Freight Rates, 1947, 270 I. C. C. 403, 456 and Ex Parte No. 168, Increased Freight Rates, 1948, 276 I. C. C. 9, 113.

11.3. As to coal there is active competition between persons and localities engaged in interstate commerce between points in Tennessee and points in other States, on the one hand, and persons and localities engaged in intrastate commerce in Tennessee, on the other.

The above finding is supported by the evidence cited on pages 47–55, inclusive, of the Commission's report in this case. The references to the pages of the transcript where the evidence will be found are shown in Appendix C to the Brief of the I. C. C., pages 11–14, 18–22, 23–29, 38–42.

12.4. The intrastate rates and charges in Tennessee on chemical, acid, pulp, and fuel wood and on coal except to Nashville and Old Hickory and intermediate points taking the same rates, are not contributing their fair share of the revenues required by the respondents to enable them to render adequate and efficient service and to operate profitably; are causing undue, unreasonable, and unjust discrimination against interstate commerce; and as to coal, with the exception noted, are causing undue preference of and advantage to persons and localities in intrastate commerce, and undue prejudice and disadvantage to persons and localities in interstate commerce.

Finding No. 4 is supported by Findings Nos. 1, 2, 3 and 6 and by evidence showing the railroads' need for additional revenue, which evidence is summarized in the Commission's report (286 I. C. C. 45–46, 58, and Appendix B) and will be found in the record, Tr. 330–403.

13.5. The unjust discrimination and undue preference and prejudice herein found to exist should be removed by applying to the Tennessee intrastate rates and charges on the commodities described in finding 4 the same respective increases as authorized thereon in Ex Parte Nos. 166 and 168 which are and for the future may be maintained by the respondents on like interstate traffic between points in Tennessee and points in adjoining southern States; provided that no intrastate rate or charge on

pulpwood shall be increased so that it will exceed the lowest level of the corresponding interstate rates on pulpwood maintained by the same carrier to or from Tennessee points.

Finding No. 5 like Finding No. 4 is an ultimate finding, and is supported by all other subsidiary findings and is an exercise by the Commission of its statutory power to eliminate the unjust discrimination against interstate commerce and the undue preference and prejudice as between persons and localities found to exist.

14. 6. The establishment of increases in intrastate rates and charges as provided in finding 5 will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, and will substantially increase the respondents revenues.

Finding No. 6 is supported by the evidence, 286 I. C C. 44–45, 55, 58–59; Tr. 8–9, 114–115, 134–135, 167, 175, and 205. The amount of the revenue the railroads will receive from the increases ordered in the intrastate rates on coal and wood was estimated at approximately $135,000 per year (286 I. C. C. 44).

15. 7. The assailed rates and charges, except as appears from the foregoing findings with respect to coal and wood, are not shown to cause undue or unreasonable advantage, preference, or prejudice, or to cause undue, unreasonable, or unjust discrimination against interstate commerce.

The findings of the Commission also included a saving clause reading as follows:

> These findings and conclusions are without prejudice to the right of the authorities of the State of Tennessee, or any other interested party, to apply for a modification thereof as to any specific intrastate rate or charge affected thereby on the ground that such rate or charge is not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.

The Court finds that the findings of the Commission are supported by substantial evidence on the record as a whole.

CONCLUSIONS OF LAW

1. The Court concludes that it has jurisdiction of this suite under Sections 1336, 2284 and 2381–25 of Title 28 of the United States Code and Section 17 (9) of the Interstate Commerce Act (49 U. S. Code, 17.9).

2. The Court concludes that the Interstate Commerce Commission had jurisdiction to enter the order complained of under Section 13 of the Interstate Commerce Act (49 U. S. Code, Section 13). *Wisconsin RR Commission* v. *CB&QR,* 257 U. S. 563.

3. The findings of the Interstate Commerce Commission are adequate to support the challenged order of the Commission. *U. S.* v. *Louisi-*

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ana, 290 U. S. 70: *King* v. *U. S.*, 344 U. S. 254, 97 Law Ed. (Adv. page 207).

4. The Court concludes that the Commission order is valid, being supported by adequate findings based on substantial evidence; that the application for an injunction should be denied, and the complaint should be dismissed.

APPELLANTS' CONTENTIONS

With respect to coal appellants contend that the intrastate rates without the Ex Parte 166 and 168 increases are higher than the interstate rates with the increases. The lack of merit in this contention is shown in the Commission's report, pages 47–51, by Exhibit 17, page 9, Exhibit 11 and by the testimony of the witnesses found at the following pages of the transcript: 240–253; 300–302; 474–478, and the exhibits introduced by the witnesses whose testimony is referred to.

Appellants also contend that the cost evidence introduced by them shows that the Tennessee intrastate rates on coal without the above mentioned increases produced greater revenues for the railroads than the interstate rates with such increases. This cost evidence was considered by the Commission at page 54 of its report and found not to sustain appellants' contention.

The record reveals that the cost evidence is also defective in that the average intrastate rate and average intrastate haul include interstate shipments, Tr. 653–655, 686; that the costs shown

do not purport to be the cost of transporting coal but apply equally to any commodity transported in gondola or hopper cars with an average weight of 54 tons per car, Tr. 687, 694–695; and that the same line-haul unit costs were used in arriving at the costs of moving interstate and intrastate traffic although the average intrastate haul of coal was said to be 85 miles and the average haul of coal in southern territory (interstate) was said to be 284 miles (Exhibits 62 and 63). Moreover, the costs shown take no account of the fact that the coal traffic originates on short rail lines and branch lines of the larger rail carriers, and that the majority of the intrastate traffic is handled in local trains whereas most of the interstate traffic is handled in through trains, 286 I. C. C. 41, 47, Tr. 32–36, 47–48.

It is inconceivable that the Tennessee Commission, with power to prescribe intrastate rates, permitted rates in excess of the interstate level, or that Tennessee shippers would have tolerated such rates. *Increases in Tennessee Freight Rates and Charges,* 272 I. C. C. 625, 631.

Appellants further contend that the Commission was required to find that the Tennessee intrastate rates on coal were lower and produced less revenue than the interstate rates with the increases. It is significant that appellants did not request the Commission to make any such finding although Rule 91 (e) of its General Rules of

Practice require that the briefs of parties shall contain "requests for specific findings, separately stated and numbered * * *." However, the Commission's findings 4, 5, and 6 show that it concluded that the intrastate coal rates were lower than the interstate rates and were not contributing their fair share of the revenues required by the railroads. These findings and findings 1 and 2 also show that the intrastate rates were abnormally low. Such findings are adequate and are supported by the evidence.

In regard to the contention made by appellants that the Commission erroneously assumed that the burden of proving that the intrastate rates on coal were less than the interstate rates was on plaintiffs and not on the railroads and that the railroads did not and were not required to carry this burden, it is submitted that there is no substance to such contention. The Commission's report completely refutes this contention and shows beyond any reasonable doubt that the burden of proof was placed on the railroads and was sustained by them.

Appellants question the validity of the Commission's order as to coal on the ground that the finding as to preference and prejudice is statewide. They direct attention to the following statement in the Commission's report (p. 59):

> As to coal, the record also warrants the determination that some of the Tennessee intrastate rates unduly prefer certain ship-

pers and localities in intrastate commerce to the undue disadvantage of and prejudice to other shippers and localities in interstate commerce.

It is submitted that the words "some" and "certain" were used because the rates to Nashville and Old Hickory and intermediate points taking the same rates, were excluded from the finding of persons and localities preference and prejudice, as well as from the finding of unjust discrimination against interstate commerce. It is clear that the word "some" used in the finding modifies "intrastate rates" and includes all of such rates except those "to Nashville and Old Hickory and intermediate points taking the same rates." It is equally clear that the word "certain" modifies "shippers and localities" and includes all intrastate shippers and localities in Tennessee, except those whose coal is shipped to Nashville and Old Hickory and intermediate points taking the same rates. This is made clear by Findings Nos. 4 and 5, *supra*, p. 4.

Georgia Public Service Comm. v. *United States*, 283 U. S. 765, and *Louisiana Public Service Comm.* v. *Texas & N. O. R. Co.*, 284 U. S. 125, sustain the Commission's findings and order.

THE FINDINGS AS TO PULPWOOD

Appellants also contend that it is unlawful for the Commission to require that the intrastate rates on pulpwood on several of the railroads op-

erating in Tennessee be increased above the level authorized by the Tennessee Commission when that level is already above the interstate rates maintained by two railroads—the Southern and C. N. O. & T. P.—in the absence of any showing of a difference in operating conditions or need for revenue.

The Commission simply required that the Tennessee intrastate rates on pulpwood, of the railroads affected by the order, be increased to the same extent that their interstate rates had already been increased. It found that such an increase was necessary to remove unjust discrimination against interstate commerce. This was clearly within the authority conferred upon the Commission by Section 13 (4) and there is no contention that the intrastate rates as increased are unreasonable.

When the case was heard before the Commission the rates on pulpwood were not upon a uniform level but no contention was there made that the differences in these rates resulted in discrimination among shippers on different railroads. The Commission did not find that the difference between the interstate and intrastate rates on pulpwood resulted in persons and localities preference-and-prejudice discrimination and there is no reason to believe that the differences in these two rates result in such preference and prejudice. The Court's attention is called to the saving clause in the Commission's report, p. 60, that;

> These findings and conclusions are without prejudice to the right of the authorities of the State of Tennessee, or any other interested party, to apply for a modification thereof as to any specific intrastate rate or charge affected thereby on the ground that such rate or charge is not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.

Appellants, or any shipper, may apply to the Commission for a modification of the order if they feel that the rates contravene the provisions of the act. In *Georgia Comm.* v. *United States,* 283 U. S. 765, at p. 772, this Court said:

> The order here challenged is state-wide in operation; and it governs a vast multitude of rates. Because of divergent conditions, a doubt may well arise in applying the rule prescribed to some particular situation. But possible uncertainty of application in isolated instances is not a sufficient ground for setting aside in its entirety, by judicial process, a carefully drawn order, otherwise valid and practicable of operation over a wide territory. The appropriate remedy under such circumstances is an application to the Commission requesting it to suspend the operation of the order in so far as it may affect the isolated cases; and, if necessary, to enter an independent order dealing specifically with them. *American Express Co.* v. *Caldwell,* 244 U. S. 617, 627. Such

specific order, if appropriate for review under the Urgent Deficiencies Act, could be dealt with by the courts without interfering with the operation of the order as a whole or with the flexible administrative processes by which it may from time to time be modified. * * *

CONCLUSION

For the foregoing reasons, it is evident that this appeal presents no substantial question, and that this Court has settled the issues raised in this appeal in the numerous cases heretofore cited. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 393

STATE OF TENNESSEE, ET AL.,

vs.

UNITED STATES OF AMERICA, ET AL.

MOTION OF INTERVENING RAILROADS TO AFFIRM

Pursuant to Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court, the intervening railroads, appellees, move that the judgment of the District Court be affirmed.

The judgment appealed from denied a petition to set aside an order of the Interstate Commerce Commission, entered by virtue of the powers conferred upon it by Sections 13(3)(4) and 15a(2) of the Interstate Commerce Act (49 U. S. C., Sections 13(3)(4) and 15a(2)),[1] requiring the railroads in Tennessee to increase their intrastate freight rates on coal and wood by the full amounts of the Ex Parte

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[1] These sections of the Interstate Commerce Act and the National Transportation Policy, which is a part of said Act, are copied in Appendix A to this motion.

Nos. 166 and 168 increases.[2] The order was entered August 19, 1952, in a proceeding entitled "No. 30720, *Tennessee Intrastate Rates and Charges*", 286 I. C. C. 41. The case presented by this appeal is on "all-fours" with *King* v. *United States*, 344 U. S. 254, decided December 22, 1952, in which the Court upheld an order of the Commission requiring the railroads in Florida to increase their intrastate freight rates by the full amounts of the Ex Parte Nos. 162 and 166 increases.

The case was decided by a specially constituted three-judge United States District Court convened pursuant to 28 U. S. C., Sections 2284 and 2385, whose decision was unanimous. Final judgment was entered July 31, 1953 and a direct appeal to the Supreme Court was allowed September 2, 1953. Such an appeal is authorized by 28 U. S. C., Sections 1253 and 2101(b).

The Questions Presented

Appellants have assigned 27 alleged errors,[3] but actually make only two basic contentions. These are the usual contentions:

1. That the Commission's order is not supported by adequate findings; and

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[2] Ex Parte Nos. 162, 166 and 168 were proceedings in which the Commission authorized general increases throughout the United States in railroad freight rates and charges. The titles and citations of the proceedings are: Ex Parte No. 162, *Increased Railway Rates, Fares and Charges, 1946*, 266 I. C. C. 537; Ex Parte No. 166, *Increased Freight Rates, 1947*, 270 I. C. C. 403; Ex Parte No. 168, *Increased Freight Rates, 1948*, 276 I. C. C. 9. A later general increase was also authorized in Ex Parte No. 175, *Increased Freight Rates, 1951*, 284 I. C. C. 589, and mimeographed report dated August 10, 1953.

[3] Assignments of Error numbered 1 and 3 to 17, inclusive, do not comply with Rule 9 of the Revised Rules of the Supreme Court. They are so general that they do not raise any specific issues. See *Seaboard Air Line R. Co.* v. *Watson*, 287 U. S. 86, 91.

2. That the findings are not supported by the evidence.

In the statement of "Questions Presented", appellants have framed some of the questions, particularly questions 1 to 4, inclusive, on the supposition that the evidence shows what they contend it shows and does not support the Commission's findings. But, of course, before any such questions are reached it must be concluded that the Commission's findings are unsupported. Assignments of Error 18 and 22, which assert the failure of the Commission to comply with Sections 7(c) and 8 of the Administrative Procedure Act (5 U. S. C., Sections 1006(c) and 1007), are wholly unsubstantial.

Statement of the Facts

Since 1946, the Commission has authorized four general increases in railroad freight rates and charges throughout the United States. These increases were authorized under the authority conferred upon the Commission by Section 15a(2) of the Interstate Commerce Act and in consonance with the National Transportation Policy. The purpose of the increases was to enable the railroads to obtain revenue sufficient to enable them to render adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and to develop, coordinate, and preserve a national transportation system "adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."[4] The necessity for the increases arose because of the great and continuing increase in the cost of railway materials and

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[4] Statements substantiating what has just been said will be found in the Commission's reports: Ex Parte No. 162, 266 I. C. C. 537, at 614; Ex Parte No. 166, 269 I. C. C. 33, at 53; Ex Parte No. 168, 276 I. C. C. 9, at 111; Ex Parte No. 175, 284 I. C. C. 589, at 660-661.

supplies, in the wages of railway employees, and in taxes, as well as the continued unprofitableness of passenger operations. Ex parte No. 166, *Increased Freight Rates, 1947*, 269 I. C. C. 33, 53, 270 I. C. C. 81, 87-89; Ex Parte No. 168, *Increased Freight Rates, 1948*, 276 I. C. C. 9, 32-41.

All the increased expenses which made increases in interstate freight rates and charges necessary were also incurred on intrastate traffic. This was pointed out in the report involved herein. *Tennessee Intrastate Rates and Charges, supra.* The Commission there stated (p. 58):

> "The need of the railroads for additional revenue to meet increased expenses was the underlying basis for the increases authorized by us in Ex Parte Nos. 166 and 168, and the increased expenses were not confined to interstate traffic, but were and are incurred also on intrastate traffic, including that in Tennessee."

The reports in the proceedings in which general increases were authorized plainly show that the Commission contemplated that said increases should be applied to intrastate as well as interstate rates. Referring specifically to the Ex Parte No. 166 increases, the Court stated in *King* v. *United States, supra,* at pages 257-258, that:

> "The Commission's estimates of revenue contemplated the application of the increased rates to intrastate, as well as to interstate transportation. The report concludes with the statement that the 'Committee of Cooperating State Commissioners . . . authorize us to state that they concur in the foregoing report.' 270 I.C.C. 403, 463."

Likewise, in Ex Parte No. 168 the Commission "invited the cooperation of State regulatory bodies, as obviously State-made rules would be involved", and included intrastate revenues and expenses in determining the amounts

of the increases it authorized. *Increased Freight Rates, 1948*, 272 I.C.C. 695, 700, 708-712; 276 I.C.C. 9, 13, 18-24, 113.

After the Interstate Commerce Commission authorized the Ex Parte No. 166 increases in interstate freight rates and charges, the railroads operating in Tennessee petitioned the Tennessee Commission to authorize the same increases in the intrastate freight rates and charges in that State. That Commission, however, refused to authorize the full amounts of these increases in the rates on many important commodities. Following the Interstate Commerce Commission's final decision in Ex Parte No. 168, the Tennessee Commission authorized a general increase of 10 percent, the same as authorized interstate. But it again refused to authorize the full amounts of the Ex Parte No. 166 increases on the commodities theretofore excepted, and made the 10-percent increase subject to further and additional exceptions.[5]

After the decisions of the Tennessee Commission, the railroads operating in that State filed a petition with the Interstate Commerce Commission, requesting it to institute an investigation under Sections 13(3)(4) and 15a(2) of the Interstate Commerce Act to determine whether or not the action of the Tennessee Commission resulted in discrimination against interstate commerce or persons-localities preference and prejudice. Such an investigation was instituted, a hearing was held before an examiner, briefs were

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[5] The efforts of the railroads to obtain the authority of the Tennessee Commission to increase their intrastate rates by the full amounts of the Ex Parte Nos. 166 and 168 increases are outlined in the Interstate Commerce Commission's report in *Tennessee Intrastate Rates and Charges*, *supra*, at pages 42-43. The commodities upon which the Tennessee Commission refused to authorize the full amounts of said increases, and a comparison between the amounts it authorized and the amounts authorized by the Interstate Commerce Commission, are shown in Appendix A to said report.

filed, and the examiner issued a proposed report in which he recommended that the intrastate rates be increased to the same extent as the interstate rates on certain of the involved commodities and not on others. Following the filing of exceptions and replies thereto, the case was argued before the entire Commission. Before the argument, the Tennessee Commission authorized the full amounts of the Ex Parte Nos. 166 and 168 increases on the commodities as to which the examiner had recommended such increases, and these commodities were not included in the Interstate Commerce Commission's report and order.[6]

The Interstate Commerce Commission adopted the examiner's proposals, except with respect to the rates on coal and wood. It found that the failure to increase the intrastate rates on coal, except those to Nashville, Old Hickory and intermediate points, by the full amounts of the Ex Parte Nos. 166 and 168 increases, resulted in both unjust discrimination against interstate commerce and persons-localities preference and prejudice; and that the failure to increase the rates on wood by these amounts resulted in unjust discrimination against interstate commerce.[7] Petitions of appellants for reconsideration were denied and, after refusal of the Tennessee Commission to authorize the increases, the Interstate Commerce Commission issued an order requiring the railroads to make said increases.[8] This is the order upheld by the unanimous decision of the three-judge District Court.

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[6] *Tennessee Intrastate Rates and Charges, supra,* at page 43.

[7] Findings Nos. 4 and 5.

[8] Order of August 19, 1952, in Appendix B to appellants' Statement As To Jurisdiction.

***The Authority of the Interstate Commerce Commission to* Raise Intrastate Rates and the Principles Which Govern The Exercise of That Authority Are Well Settled.**

Sections 13(3)(4) and 15a(2) of the Interstate Commerce Act were parts of the Transportation Act of 1920.[9] Since that time numerous decisions of the Court have made plain the Commission's authority and duty under these sections, as well as the principles which govern the exercise of that authority. Among said decisions are the following:

Wisconsin R. R. Comm. v. *C., B. & Q. R. Co.*, 257 U. S. 563;
New York v. *U. S.*, 257 U. S. 591;
U. S. v. *Louisiana*, 290 U. S. 70;
Alabama v. *U. S.*, 283 U. S. 776;
Georgia Pub. Serv. Comm. v. *U. S.*, 283 U. S. 765;
Ohio v. *United States*, 292 U. S. 498;
Illinois Comm. Com. v. *U. S.*, 292 U. S. 474;
Florida v. *U. S.*, 282 U. S. 194;
Florida v. *U. S.*, 292 U. S. 1;
North Carolina v. *U. S.*, 325 U. S. 507;
King v. *United States*, 344 U. S. 254.

These decisions establish two propositions which are especially pertinent in the instant case. They are:

1. The authority granted the Commission over intrastate rates is to be considered in the light of its affirmative duty to fix rates and to take other important steps to maintain an adequate national railway system; and

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[9] Section 15a has been changed since its enactment in 1920, but the changes emphasize the duty of the Commission to prescribe rates which will give carriers adequate revenue. *Florida* v. *United States*, 292 U. S. 1, 6-8.

2. The Court will examine the findings of the Commission to determine whether they are adequate to support its order, and will examine the evidence to the extent necessary to determine whether the findings are supported by substantial evidence on the record as a whole; but the Court will not substitute its judgment for the judgment of the Commission.

The Commission's Findings

The District Court made 15 findings of fact and 4 conclusions of law. The first 8 findings of fact are largely prelude; the last 7 contain the findings of the Commission and references to the evidence which supports them. The latter findings, together with the District Court's references to the evidence supporting those findings, are:

> "The Court adopts the following findings of the Interstate Commerce Commission, all of which findings are supported by substantial evidence:
>
> "9. '1. The conditions incident to the intrastate transportation of freight in Tennessee are not more favorable than those incident to the interstate transportation of freight between points in Tennessee and between Tennessee, on the one hand, and the adjoining States in southern territory, on the other.'
>
> "This finding of the Commission is supported by the evidence (Tr. 32-56), and by many previous decisions of the Commission, among which are, Southern Class Rate Investigation, 100 I.C.C. 513, 623; Southern Cement Rates, 132 I.C.C. 427, 455; Sand, Gravel, Slag, Stone and Chert, 165 I.C.C. 731; Increases in Tennessee Freight Rates and Charges, 272 I.C.C. 625, 646.
>
> "10. '2. The amounts and percentages by which interstate freight rates and charges between points in Tennessee and points in adjoining States were in-

creased, as authorized in Ex Parte Nos. 166 and 168, are just and reasonable.'

"Finding No. 2 is substantially the same as the finding made in Ex Parte No. 166, Increased Freight Rates, 1947, 270 I.C.C. 403, 456 and Ex Parte No. 168, Increased Freight Rates, 1948, 276 I.C.C. 9, 113.

"11. '3. As to coal, there is active competition between persons and localities engaged in interstate commerce between points in Tennessee and points in other States, on the one hand, and persons and localities engaged in intrastate commerce in Tennessee, on the other.'

"The above finding is supported by the evidence cited on pages 47-55, inclusive, of the Commission's report in this case. The references to the pages of the transcript where the evidence will be found are shown in Appendix C to the Brief of the I.C.C., pages 11-14, 18-22, 23-29, 38-42.

"12. '4. The intrastate rates and charges in Tennessee on chemical, acid, pulp, and fuel wood and on coal, except to Nashville and Old Hickory and intermediate points taking the same rates, are not contributing their fair share of the revenues required by the respondents to enable them to render adequate and efficient service and to operate profitably; are causing undue, unreasonable, and unjust discrimination against interstate commerce; and as to coal, with the exception noted, are causing undue preference of and advantage to persons and localities in intrastate commerce, and undue prejudice and disadvantage to persons and localities in interstate commerce.'

"Finding No. 4 is supported by Findings Nos. 1, 2, 3, and 6 and by evidence showing the railroads' need for additional revenue, which evidence is summarized in the Commission's report (286 I.C.C. 45-46, 58, and Appendix B) and will be found in the record, Tr. 330-403.

"13. '5. The unjust discrimination and undue preference herein found to exist should be removed by applying to the Tennessee intrastate rates and charges on the commodities described in finding 4 the same respective increases as authorized thereon in Ex Parte Nos. 166 and 168 which are and for the future may be maintained by the respondents on like interstate traffic between points in Tennessee and points in adjoining southern States; provided that no intrastate rate or charge on pulpwood shall be increased so that it will exceed the lowest level of the corresponding interstate rates on pulpwood maintained by the same carrier to or from Tennessee points.'

"Finding No. 5 like Finding No. 4 is an ultimate finding, and is supported by all other subsidiary findings and is an exercise by the Commission of its statutory power to eliminate the unjust discrimination against interstate commerce and the undue preference and prejudice as between persons and localities found to exist.

"14. '6. The establishment of increases in intrastate rates and charges as provided in finding 5 will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, and will substantially increase the respondents' revenues.'

"Finding No. 6 is supported by the evidence, 286 I.C.C. 44-45, 55, 58-59; Tr. 8-9, 114-115, 134-135, 167, 175, and 205. The amount of the revenue the railroads will receive from the increases ordered in the intrastate rates on coal and wood was estimated at approximately $135,000 per year (286 I.C.C. 44).

"15. '7. The assailed rates and charges, except as appears from the foregoing findings with respect to coal and wood, are not shown to cause undue or unreasonable advantage, preference, or prejudice, or

to cause undue, unreasonable, or unjust discrimination against interstate commerce.'

"The findings of the Commission also included a saving clause reading as follows:

'These findings and conclusions are without prejudice to the right of the authorities of the State of Tennessee, or any other interested party, to apply for a modification thereof as to any specific intrastate rate or charge affected thereby on the ground that such rate or charge is not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.'

"The Court finds that the findings of the Commission are supported by substantial evidence on the record as a whole."

A comparison of the above findings with the findings held adequate in *King* v. *United States, supra,* note 13, makes it clear that the order herein assailed is supported by adequate findings. The adequacy of these findings is also made plain by a comparison of them with the findings held adequate in *United States* v. *Louisiana, supra.* The findings there upheld were made in *Increases in Intrastate Freight Rates,* 186 I.C.C. 615, and appear at pages 642-643.

The Attack upon the Findings That the Rates on Coal Resulted in Unjust Discrimination Against Interstate Commerce and Should Be Increased.

Appellants assert that the Tennessee intrastate rates on coal, without the Ex Parte Nos. 166 and 168 increases, are already as high as the interstate rates with said increases and are contributing more to the railroads' revenues. Consequently, they argue that the District Court should have concluded that the Commission had no authority to require

the intrastate rates to be increased; that its Findings Nos. 4-6 are not supported by adequate subsidiary findings, or by the evidence, and that its order is invalid. They say that it was necessary for the Commission to find, and for the evidence to show, that the intrastate rates ordered increased were lower and contributed less to the carriers' revenues than the interstate rates which had already been increased (Assignments of Error, Nos. 2, 19, 20 and 21).

These contentions can best be answered by an examination of the rates on coal and a brief consideration of the cost evidence.

The Rates On Coal

Since 1925, the railroads have followed the policy of maintaining interstate and intrastate rates on the same level, the exceptions in Tennessee being due to the refusal of the State Commission to permit the intrastate rates to be increased to the same extent as the interstate rates (286 I. C. C. 54). The coal rate adjustment in the South and in Tennessee is of long standing. It is a group and differential adjustment as contrasted with a mileage adjustment, although a mileage scale is generally used in arriving at the rates from the base groups. Stated another way, coal mines are grouped and the same rate applies from all mines in a group to a given destination. The rates from the base group are usually on a mileage basis and the rates from the other groups are related to those from the base group. The result, as the Commission states, is "an extensive rate structure based on differential rates from the various competing groups of mines to common markets" (286 I. C. C. 48).

The following tabulation, compiled from the Commission's report and exhibits of record, shows four typical examples, referred to by the Commission, of the disruption of the relationship of the rates from competing interstate

and intrastate groups which was brought about by the refusal of the Tennessee Commission to authorize the full amounts of the Ex Parte Nos. 166 and 168 increases. The disruption today is greater than that shown under "Present Differential", as the Tennessee Commission has also refused to authorize any part of the Ex Parte No. 175 increases on coal or pulpwood. All of the destinations shown are in Tennessee.

From	To	Present Rates	Normal Differential	Present Differential
Jellico group	Chattanooga	$2.32–I*	none	+ 19¢ [1]
Jellico group	Chattanooga	$2.13–S*		
Western Ky.	Columbia	$2.75–I	none	+ 21¢ [2]
Tracy City	Columbia	$2.54–S		
Western Ky.	Memphis	$3.03–I	− 10¢	+ 6¢ [3]
Tracy City	Memphis	$2.97–S		
Harlan County	Lewisburg	$3.72–I	+$1.00	+$1.39 [4]
Tracy City	Lewisburg	$2.33–S		

* I denotes interstate rates; S denotes intrastate rates.
[1] Exhibit 17, page 11; 286 I.C.C. 55.
[2] Exhibit 36, page 2; 286 I.C.C. 49–50.
[3] Exhibit 36, page 1; 286 I.C.C. 49.
[4] Exhibit 51; 286 I.C.C. 50–51.

In Docket No. 25816, *Anderson Bros. & Foster* v. *Alabama Central R. Co.*, 206 I. C. C. 175, the Commission prescribed interstate rates on coal from mines in western Kentucky, northern Alabama and the Whitwell, Tennessee, group to destinations in Tennessee. And in Docket No. 29390, *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I. C. C. 291, it prescribed rates from mines in Tennessee, Virginia and West Virginia to destinations in North and South Carolina and to Augusta, Ga. In the tabulation below we compare the intrastate rates required by the Tennessee Commission and those established under the assailed order of the Interstate Commerce Commission with the interstate rates prescribed in the two cases mentioned. All the rates shown, except those required by the Tennessee Commission, have been increased as authorized by Ex Parte Nos. 166 and 168. The origin, the Lake City group, is the base group

in eastern Tennessee, and a large volume of coal moves from said group and related groups to points in Tennessee and other states (Tr. 140;[10] Ex. 17, pp. 3-7a). The tabulation has been compiled from Exhibit 17, page 9.

From Lake City, Tenn. Group To	Miles	Intrastate Rates A	Intrastate Rates B	Interstate Rates C	Interstate Rates D
Aloca	50	179	196	244	224
Athens	90	200	218	270	251
Chattanooga	146	200	218	303	286
Cleveland	117	200	218	281	264
Dayton	81	200	218	270	251
Greeneville	109	193	210	281	264
Johnson City	141	213	232	303	286
Jonesboro	133	198	211	292	275
Lenoir City	59	190	218	244	224
Louden	64	190	218	257	238
Morristown	77	179	196	257	238

A. Rates required by order of the Tennessee Commission.
B. Rates established under order of Interstate Commerce Commission assailed herein.
C. Rates prescribed in Docket No. 29390, increased as authorized in Ex Parte Nos. 166 and 168.
D. Rates prescribed in Docket No. 25816, increased as authorized in Ex Parte Nos. 166 and 168.

These tabulations show that the Tennessee intrastate rates required by order of the Tennessee Commission and those established as a result of the assailed order of the Interstate Commerce Commission are both lower than interstate rates prescribed by the Interstate Commerce Commission. They completely refute appellants' contention with respect to the relative level of the interstate and intrastate rates. This contention is also refused by the rate comparisons in Exhibit 11.

The Cost Evidence

Appellants sought to show by cost evidence that the intrastate rates on coal, without the Ex Parte Nos. 166 and 168 increases, were more profitable to the railroads than the

[10] The reference "Tr." is to the transcript of testimony at the hearing before the Interstate Commerce Commission's examiner.

interstate rates with said increases. To make such a showing two things were essential: (1) to obtain representative interstate and intrastate rates; and (2) to establish the cost of handling *coal* moving under those rates. Appellants did neither.

Referring particularly to the rates used as the basis of the cost computations, the Commission stated (286 I. C. C. 54):

> "• • • the Tennessee Valley Authority relies upon computations based upon excerpts from the Carload Waybill Analyses, 1948, Statement No. 5032 and Statement No. 5028, issued in June 1950, by our Bureau of Transport Economics and Statistics. The computations were made by witnesses who could not give any of the shipping points covered by the statements or the transportation conditions or circumstances surrounding the movements or the establishment of the rates charged. The cost computations were also made in connection with excerpts from the waybill analyses statements. The traffic statistics included both intrastate and interstate movements. In the circumstances, the computations do not support conclusively these contentions."

The Commission's criticisms are valid. Their force is strengthened by the fact that much coal moves between points in Tennessee via interstate routes and is charged interstate rates, but such coal is considered as intrastate traffic in the Waybill Analyses, which, incidentally, include only 1 percent of the total shipments (286 I. C. C. 49-50, 55; Tr. 654, 686). Thus, the so-called average intrastate rate and the average intrastate haul, which are the very foundations of appellants' cost computations, are not intrastate at all (Tr. 688-689). Neither are the so-called average interstate rates and hauls actually interstate (Tr. 654).

While the Commission did not discuss the cost formula used by appellants, it may be pointed out that this formula

does not purport to show the actual cost of handling a particular commodity; it only purports to show the average cost of handling commodities in different types of equipment (Tr. 694-695). The so-called costs shown by appellants would apply equally whether the commodity transported was coal or sand and gravel (Tr. 687). Moreover, the costs shown take no account of the fact that coal originates in mountainous territory; that "many of the mines are served by short rail lines and branch lines of the larger rail carriers" (286 I. C. C. 47); and that the cost of handling intrastate shipments is greater than the cost of handling interstate shipments, as most of the latter move in through trains (Tr. 32-36, 47-48).

Obviously, the validity of cost evidence and the weight to be accorded it are primarily for the Commission to determine. Cost is by no means the controlling factor in rate making (*Alabama Great S. Ry. Co.* v. *United States*, 340 U. S. 216, 223, and Note 4), and it was stated in the *King Case, supra*, page 273, that:

> "'Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues. Compare *American Express Co.* v. *Caldwell*, 244 U. S. 617; *United States* v. *Louisiana, supra* [290 U. S. 70]; *Florida* v. *United States, ante* [292 U. S.], p. 1.' *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 483-484. See also, *Montana* v. *United States*, 106 F. Supp. 778, 783."

The Finding Said To Have Been Necessary

Appellants contend that a specific finding that "the intrastate rates on coal are on a lower level than the interstate

rates or are returning a lesser proportionate share of the revenues required by the rail carriers" was necessary because of and also independently of, Section 8(b) of the Administrative Procedure Act (Statement As To Jurisdiction, p. 11).

It should be pointed out that appellants' briefs before the Commission contained no request for specific findings,[11] and we do not think they are in any position to complain of the absence of the finding they now say was necessary. But, however that may be, there can be no doubt of the fact that the Commission concluded that the intrastate rates on coal were lower than the interstate rates and were not contributing their fair proportionate share of the railroads' revenues. Moreover, it expressed these conclusions by adequate findings.

The Commission found that the intrastate rates on coal "are not contributing their fair share of the revenues required by the respondents", and "are causing undue, unreasonable, and unjust discrimination against interstate commerce" (Finding 4); that the discrimination should be removed by applying to the intrastate rates on coal the same "increases as authorized thereon in Ex Parte Nos. 166 and 168" (Finding 5); and that the addition of said increases "will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, and will substantially increase the respondents' revenues" (Finding 6). These findings, together with Findings 1 and 2, also make it plain that the Commission concluded that the intrastate rates without the increases were abnormally low. The findings were manifestly sufficient.

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[11] Rule 91(e) of the Commission's General Rules of Practice provides:

"Requested findings.—Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Commission to make."

The Burden Of Proof

Seizing upon the Commission's statement (286 I.C.C. 54) that "In the circumstances [appellants' cost] computations do not support conclusively these contentions.", it is said that the Commission placed the burden of proof upon appellants, contrary to Section 7 (c) of the Administrative Procedure Act (Assignments of Error, Nos. 22 and 23). But the contention is disproved by statements following immediately the statement seized upon. Continuing, the Commission said (286 I.C.C. 54):

> "The evidence of record supports the conclusion that the respondents, after the decision of 1925 in the southern class rate investigation, adopted and have since followed the policy of maintaining intrastate rates throughout southern territory on the same relative level as intersate rates on practically all commodities. With respect to Tennessee, the exceptions are due to the action of the Tennessee commission in refusing to permit the intrastate rates on certain commodities to be increased to the full extent authorized in the interstate rates."

The Attack upon the Finding of Persons–Localities Preference and Prejudice with Respect to Coal

It is asserted that the finding that the intrastate rates on coal resulted in persons-localities preference and prejudice is not supported by subsidiary findings showing in detail "the particular rates causing the undue preference and prejudice and the shippers or localities * * * unduly prejudiced and disadvantaged", or by findings sufficient to support the conclusion that the preference and prejudice is so widespread as to justify a statewide order (Assignments of Error, Nos. 24 and 25).

We point out that the Commission's order should be sustained even if the finding of persons-localities preference

and prejudice is inadequate. *King* v. *United States, supra,* Note 14; *United States* v. *Louisiana, supra.* But we think the finding (No. 4) is entirely adequate, especially when considered, as it should be, in the light of Finding No. 3 and what was said in the Commission's report. *Georgia Public Service Comm.* v. *United States,* 283 U.S. 765, 771.

Coal, as the Court knows, is one of the most widely used of all commodities. The evidence summarized in the Commission's report shows that there are movements of coal from interstate and intrastate mines to destinations throughout the State of Tennessee (286 I.C.C. 47-51, 55). This evidence also shows that there is keen competition between the interstate and intrastate producers in the sale of coal in Tennessee, and the Commission so found (286 I.C.C. 47-51, 55; Finding No. 3). Thus, the evidence and Finding No. 3 sustain the ultimate finding of statewide persons-localities preference and prejudice.[12]

In *Georgia Public Service Comm.* v. *United States, supra,* the Court sustained an order of the Commission, under Section 13(4), based upon a finding that the intrastate rates on chert, clay, sand and gravel resulted in statewide persons-

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[12] On page 59 of its report the Commission stated "that some of the Tennessee intrastate rates unduly prefer certain shippers and localities in intrastate commerce to the undue disadvantage of and prejudice to other shippers and localities in interstate commerce." Much is sought to be made of the use of the words "some" and "certain". But these words were used solely for the purpose of making it clear that what was said did not include Nashville, Old Hickory, and intermediate points taking the same rates (Findings 4 and 5.) The railroads had reduced the interstate and intrastate rates to the named destinations on account of the severe competition of natural gas, and had reduced the rates to the intermediate points to comply with Section 4(1) of the Interstate Commerce Act (49 U.S.C., Section 4(1)) and Section 5419 of the Tennessee Statutes (286 I.C.C. 51-52). Competitive conditions frequently make it necessary to reduce rates to particular localities in the face of general increases (286 I. C. C. 58). With this exception, the Commission's finding of persons-localities preference and prejudice is statewide in scope; and it is supported by the evidence.

localities preference and prejudice. In its opinion the Court said (p. 774):

> "When an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings. Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 579, 66 L. ed. 371, 379, 22 A. L. R. 1086, 42 S. Ct. 232. Compare Beaumont, S. L. & W. R. Co. v. United States, 282 U.S. 74, 83, ante, 221, 228, 51 S. Ct. 1. While the order relates only to a few commodities, the scales of rates are statewide in operation; and they apply to shipments between hundreds of points of origin and destination. To require specific evidence and separate adjudication in respect to each would be tantamount to denying the possibility of granting relief.

See, also, *Louisiana Public Service Comm.* v. *Texas and N. O. R. Co.*, 284 U.S. 125.

The Commission would be unable to exercise the powers conferred upon it by the persons-localities preference and prejudice provision of Section 13(4) if it were required to make the detailed findings appellants contend are necessary.

The Attack Upon the Findings With Respect to Pulpwood

The Commission found that the intrastate pulpwood rates of all except two of the Tennessee railroads resulted in unjust discrimination against interstate commerce and should be increased by the amounts authorized in Ex Parte Nos. 166 and 168 (Findings Nos. 4 and 5). But the finding directing the increases (No. 5) contains the proviso "that no intrastate rate or charge on pulpwood shall be increased so that it will exceed the lowest level of the corresponding interstate rates on pulpwood maintained by the same carrier to or from Tennessee points."

In order to have the same level of rates interstate and intrastate on pulpwood, certain railroads in the South in-

cluding two that operate in Tennessee, adopted a reduced uniform scale for application on that commodity. This scale results in rates lower than the interstate or Tennessee intrastate rates of other Tennessee lines. The lawfulness of the scale is being investigated by the Interstate Commerce Commission, but that Commission and the Tennessee Commission have permitted rates made by use of it to be established (286 I.C.C. 56, Note 4). The existence of these lower rates, which are not affected by the Interstate Commerce Commission's order herein, is the sole basis for appellants' attack upon the Commission's findings with respect to pulpwood.

Appellants allege that, before the Commission could require an increase in rates higher than those under the reduced uniform scale maintained by two Tennessee railroads, it was obliged to find that the operating conditions for pulpwood traffic on the railroads whose rates were required to be increased were less favorable, and their revenue needs greater, than those of the two lines with the lower rates (Assignment of Error, No. 26). They also allege that the existence of the lower rates negatives the Commission's finding of unjust discrimination against interstate commerce and brings about discrimination among Tennessee intrastate shippers on different railroads (Assignment of Error, No. 27).

The two railroads with the lower rates have the same level of rates interstate and intrastate. The Commission's order requires the other railroads in Tennessee to establish intrastate rates which will more nearly equal their interstate rates. Appellants say that the Commission cannot do this without a detailed investigation of the comparative operating conditions and revenue needs of the two railroads and all other railroads in Tennessee. This condition is not sound. If it were, general revenue cases such as the in-

stant case would be turned into complicated and protracted rate cases, and the administrative arm of the Commission would be paralyzed.[13] *King v. United States, supra,* page 275.

There is nothing in the Interstate Commerce Act which requires all railroads to maintain the same level of rates on a given commodity, and nothing in Section 13(4) which forbids the removal of unjust discrimination against interstate commerce when the rates necessary for that purpose are higher than the rates of some other railroads on the same commodity. On the contrary, that section forbids, and declares to be unlawful, unjust discrimination against interstate commerce caused by any rate made or imposed by state authority. It also requires the Commission to prescribe the rate necessary to remove such discrimination.

In *Florida* v. *United States,* 292 U.S. 1, the Court reviewed and upheld an order of the Commission, under Section 13(4), requiring a single railroad, the Atlantic Coast Line, to increase its Florida intrastate log rates for distances of 170 miles and less. The order was based upon a finding of unjust discrimination against interstate commerce. It was attacked on the ground, among others, that the rates required to be established were higher than the interstate and intrastate log rates of certain other carriers in southern territory (292 U.S. 4, 11).

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[13] There is no contention that the Tennessee intrastate rates, increased as required by the Commission's order, are unreasonable. But we point out that the pulpwood rates in the South and in Tennessee are based on the so-called Roanoke Rapids Scale, or scales closely approximating it (286 I.C.C. 56), and that the Commission has recognized that rates under that scale are depressed. *Pulpwood, North Carolina and Virginia to Cypress, Va.,* 235 I.C.C. 11, 13; *Class Rate Investigation,* 1939, 262 I.C.C. 447, 597-598. The Tennessee intrastate rates, after being increased as required, are still less than the interstate rates of the same railroads (286 I.C.C. 56).

The Tennessee intrastate rates on pulpwood were not on a uniform level at the time of the hearing before the Commission, but no contention was then made that the differences in these rates resulted in "discrimination among shippers on different railroads." The allegation that the increased rates required by the Commission result in such discrimination is a conclusion of counsel, not a statement of fact. Moreover, the saving clause in the Commission's findings and conclusions affords any injured party ample opportunity to secure relief if injustices should result from its order.

Conclusion

In the *King Case, supra,* the Court said (p. 272):

> "The Commission has applied to the Florida operations the same conclusion it reached as to the need for increased revenue on a national basis and has distributed the burden within Florida along the same lines it followed when estimating the revenues available in the southern territory from intrastate as well as interstate operations. In the absence of any showing that it is not applicable to Florida, the evidence which forms the basis of the Commission's nationwide order becomes the natural basis for its Florida order."

The above statement applies with full force to what the Commission has done in the instant case. It has found, and the evidence shows, that the railroads in Tennessee need additional revenue (Finding 4; 286 I.C.C. 45-46 and Appendix B). It has applied to the Tennessee operations the same conclusion it reached as to the need for increased revenue on a national basis and has distributed the burden within Tennessee along the same lines it followed in estimating the revenues available in southern territory from interstate as well as intrastate operations. Its order simply reminds appellants that Tennessee is a part of the Union.

WHEREFORE, the premises considered, the intervening railroads pray that the judgment of the three-judge District Court be affirmed.

Respectfully submitted,

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APPENDIX "A"

Pertinent Sections of the Interstate Commerce Act

National Transportation Policy

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (49 U.S.C., preceding Section 1.)

Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State

bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III. (49 U.S.C., Section 13(3).)

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding. (49 U. S. C., Section 13(4).)

In the exercising of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. (49 U.S.C., Section 15a(2).)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 393

STATE OF TENNESSEE
RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, AND HAMMOND FOWLER, CAYCE PENTECOST, AND JOHN C. HAMMER, AS MEMBERS OF AND CONSTITUTING THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE
TENNESSEE VALLEY AUTHORITY

Appellants

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appellees

PETITION FOR REHEARING

The appellants in the above-styled cause petition the Court for rehearing on the following grounds:

This case involves an order of the Interstate Commerce Commission which increased the intrastate rates on certain movements of coal, and also on pulpwood, within the State of Tennessee. The Tennessee Valley Authority introduced substantial and uncontradicted evidence at the hearing before the Interstate Commerce Commission that

the intrastate rates on coal were already higher than the interstate rates and were returning a greater margin above cost, but the Interstate Commerce Commission made no finding as to the relative levels of the interstate and intrastate rates.

The basic contentions of the appellants are, first, that the Interstate Commerce Commission lacks the statutory authority to compel intrastate rates to be raised above the level of interstate rates under the guise of removing an alleged discrimination against interstate commerce, and second, that the Interstate Commerce Commission was required by section 8(b) of the Administrative Procedure Act (60 Stat. 242, 5 U.S.C. sec. 1007(b)) to make a finding as to the relative level of interstate and intrastate rates, this being one of the "material issues of fact . . . presented on the record." That these were the issues in the case seems not to have been understood by the District Court since it did not pass on either of them. Neither issue is even mentioned in the findings of fact and conclusions of law. This is not the usual case, therefore, in which this Court has the benefit of the consideration given to the issues by the court below. *Cf. United States* v. *Ballard*, 322 U. S. 78, 88; *United States* v. *Sheridan*, 329 U. S. 379, 392.

The decision of this Court granting the motion to affirm must mean either that the Interstate Commerce Commission has the power to compel intrastate rates to be raised above the level of interstate rates so that they will provide a greater proportionate share of the railroads' revenues than do corresponding interstate rates, or that even though the Interstate Commerce Commission has no such power the issue is not one on which it was required to make a finding.

If the decision means that section 13 of the Inter-

state Commerce Act (41 Stat. 484, as amended, 49 Stat. 543, as amended, 54 Stat. 911, 49 U. S. C. sec. 13) grants the Commission authority to require that intrastate rates provide a greater proportionate share of the railroads' revenues than do the corresponding interstate rates, we submit that this is a novel proposition of law which should not be adopted without full consideration on a complete record that has been adequately briefed and argued.

If the correct interpretation of the Court's decision is that the Interstate Commerce Commission did not need to make a finding as to the relative levels of the interstate and intrastate rates, we submit that the effect of the decision is to write out of section 8(b) of the Administrative Procedure Act the requirement of findings and to leave the Interstate Commerce Commission free to interpret its statute in any way that it sees fit. The contention that the intrastate rates were higher than the interstate rates was the basic issue presented; substantial evidence was introduced to support it; and this evidence was uncontradicted, so that the Interstate Commerce Commission could not on the record have made a finding that the intrastate rates were on a lower level than the interstate rates. The effect of this decision, therefore, is to permit the Interstate Commerce Commission to increase intrastate rates without a finding on the basic issue before it for determination. The Administrative Procedure Act was adopted by Congress for the purpose of correcting the evils which had developed in the field of administrative law and to safeguard litigants against administrative abuse. If formalized findings wholly unrelated to the facts of the case are all that are required to support a decision of the Interstate Commerce Commission, a litigant before that Commission no longer has any protection against action taken in disregard of the requirements of law.

WHEREFORE, on the foregoing grounds it is respectfully urged that this petition for rehearing be granted and that the Court note probable jurisdiction and either place the cause on the docket for argument or remand the case to the District Court with instructions to pass upon the issues involved.

Respectfully submitted,

ALFRED T. MACFARLAND
Counsel for Plaintiff-Appellants State of Tennessee, Railroad and Public Utilities Commission of the State of Tennessee, and Hammond Fowler, Cayce Pentecost, and John C. Hammer, as members of and constituting the Railroad and Public Utilities Commission of Tennessee

JOSEPH C. SWIDLER
Counsel for Intervening Plaintiff-Appellant Tennessee Valley Authority

I, Joseph C. Swidler, counsel for the above-named Tennessee Valley Authority, do hereby certify that the foregoing petition for rehearing in this cause is presented in good faith and not for delay.

.....

Joseph C. Swidler

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FILED
DEC 22 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 393

STATE OF TENNESSEE, RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CAROLINA CLINCHFIELD AND OHIO RAILWAY, ETC., ET AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

REPLY OF INTERVENING RAILROADS, APPELLEES, TO PETITION OF APPELLANTS FOR REHEARING

James A. Bistline,
A. J. Dixon,
Frank W. Gwathmey,
M. T. Hastings,
Edwin F. Hunt,
Prime F. Osborn,
William H. Swiggart,
Charles P. Reynolds,
Counsel for Intervening Railroads, Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 393

STATE OF TENNESSEE, ET AL.

vs.

UNITED STATES OF AMERICA, ET AL.

REPLY OF INTERVENING RAILROADS, APPELLEES, TO PETITION OF APPELLANTS FOR REHEARING

The intervening railroads, appellees, respectfully submit the following as their reply to appellants' petition for rehearing.

This case involves an order of the Interstate Commerce Commission, issued under Sections 13(3)(4) and 15a(2) of the Interstate Commerce Act (49 U. S. C., Sections 13 (3)(4) and 15a(2)), requiring the intrastate rates on coal and pulpwood within the State of Tennessee to be increased by the amounts authorized in Ex Parte No. 166, *Increased Freight Rates, 1947,* 270 I. C. C. 403, and Ex Parte No. 168, *Increased Freight Rates, 1948,* 276 I. C. C. 9. In the proceedings just cited the Commission found that the interstate freight rates and charges of the railroads of the United States should be increased by the

amounts there authorized in order that the objectives of Section 15a(2) and the National Transportation Policy might be attained. And its reports make it clear that the Commission also contemplated that the same increases should be applied to intrastate freight rates and charges throughout the United States. *Increased Freight Rates, 1947*, 270 I. C. C. 403, 463; *Increased Freight Rates, 1948*, 276 I. C. C. 9, 13, 18-24. See also *King* v. *United States*, 344 U. S. 254, 257-258.

Appellants sought to enjoin and set aside the order of the Commission, on the ground that it was not supported by adequate findings and that the findings were not supported by the evidence. But a specially constituted three-judge District Court concluded that the order was supported by the evidence and by adequate findings and dismissed the complaint. *State of Tennessee* v. *United States*, 113 F. Supp. 634. In holding the Commission's findings adequate the District Court relied upon this Court's decisions in *United States* v. *Louisiana*, 290 U. S. 70, and *King* v. *United States*, 344 U. S. 254.

Appellants then appealed to this Court, and the Interstate Commerce Commission and the intervening railroads filed motions to affirm. By order of November 30, 1953, the Court granted the motions to affirm. Appellants have now filed a petition for rehearing in which they limit their attack to the Commission's findings with respect to the Tennessee intrastate rates on coal.

The petition for rehearing is based on the following statement (pp. 1-2):

> "The Tennessee Valley Authority introduced substantial and uncontradicted evidence at the hearing before the Interstate Commerce Commission that the intrastate rates on coal were already higher than the interstate rates and were returning a greater margin above cost, but the Interstate Commerce Commission

made no finding as to the relative levels of the interstate and intrastate rates."

The above statement is wholly incorrect. The Interstate Commerce Commission considered the contentions made by the Tennessee Valley Authority with respect to the relative levels and profitableness of the interstate and intrastate coal rates and made the following statement in regard thereto (286 I. C. C. 54):

> "In support of its contentions that intrastate coal rates in Tennessee are generally as high or higher than interstate coal rates, and that the going intrastate coal rates are more remunerative to the respondents than the interstate rates, the Tennessee Valley Authority relies upon computations based upon excerpts from the Carload Waybill Analyses, 1948, Statement No. 5032 and Statement No. 5028, issued in June 1950, by our Bureau of Transport Economics and Statistics. The computations were made by witnesses who could not give any of the shipping points covered by the statements or the transportation conditions or circumstances surrounding the movements or the establishment of the rates charged. The cost computations were also made in connection with excerpts from the waybill analyses statements. The traffic statistics included both intrastate and interstate movements. In the circumstances, the computations do not support conclusively these contentions. The evidence of record supports the conclusion that the respondents, after the decision of 1925 in the southern class rate investigation, adopted and have since followed the policy of maintaining intrastate rates throughout southern territory on the same relative level as interstate rates on practically all commodities. With respect to Tennessee, the exceptions are due to the action of the Tennessee commission in refusing to permit the intrastate rates on certain commodities to be increased to the full extent authorized in the interstate rates."

The evidence of record plainly shows that the Tennessee intrastate rates on coal are not in excess of the interstate rates to, from, and between points in Tennessee. For example, the tabulation on page 14 of our motion to affirm shows that the intrastate rates required by the order of the Interstate Commerce Commission are less than the interstate rates prescribed by that Commission to, from, or between points in Tennessee in *Anderson Bros. & Foster* v. *Alabama Central R. Co.*, 206 I. C. C. 175, and *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I. C. C. 191. In cases decided since the close of the hearing in the instant case the so-called Anderson Bros. & Foster Scale has been prescribed on coal moving from origins in western Kentucky to additional destinations in Tennessee. *Kentucky Coal Agency, Inc.* v. *Alabama Great Southern Ry. Co.*, 283 I. C. C. 175, and *Mead Corporation* v. *Southern Railway Co.*, 286 I. C. C. 66. The fact is that the interstate and intrastate coal-rate adjustments have been in effect for more than fifty years and competition between the various groups of mines is keen (286 I. C. C. 48). The Tennessee Commission would not have permitted the intrastate rates to exceed the interstate rates.

The evidence further shows that the conditions incident to the intrastate transportation of freight in Tennessee are not more favorable than the conditions incident to its interstate transportation to, from, and between points in that State. In other words, the cost of handling intrastate traffic is as great as, or greater than, the cost of handling interstate traffic (286 I. C. C. 45, and Finding 1).

The Commission found specifically, among other things, that the intrastate rates on coal "are not contributing their fair share of the revenues required by respondents" and "are causing undue, unreasonable, and unjust discrimination against interstate commerce" (Finding 4); that the discrimination should be removed by applying to

the intrastate rates on coal the same "increases as authorized thereon in Ex Parte Nos. 166 and 168" (Finding 5); and that the addition of said increases "will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges and will substantially increase the respondents' revenues" (Finding 6).

These findings, when considered in the light of the evidence of record and what was said with respect to the contentions of the Tennessee Valley Authority concerning the relative levels and profitableness of the interstate and intrastate rates, make it plain that the Commission concluded and found that the intrastate rates on coal were not higher or more profitable than the interstate rates. The findings made are clearly sufficient to sustain the Commission's order, and they also meet the requirements of the Administrative Procedure Act. *King* v. *United States*, 344 U. S. 254; *United States* v. *Louisiana*, 290 U. S. 70; and *Capital Transit Co.* v. *United States*, 97 F. Supp. 614.

WHEREFORE, the premises considered, the intervening railroads, appellees, pray that appellants' petition for rehearing be denied.

Respectfully submitted,

JAMES A. BISTLINE,
A. J. DIXON,
FRANK W. GWATHMEY,
M. T. HASTINGS,
EDWIN F. HUNT,
PRIME F. OSBORN,
WILLIAM H. SWIGGART,
CHARLES P. REYNOLDS,
Counsel for Intervening Railroads, Appellees.

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FILED
DEC 24 1953
HAROLD B. WILLEY,

No. 333

In the Supreme Court of the United States

OCTOBER TERM, 1953

STATE OF TENNESSEE, RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, AND HAMMOND FOWLER, JOHN C. HAMMER, AND CAYCE PENTECOST, AS MEMBERS OF AND CONSTITUTING THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

REPLY OF INTERSTATE COMMERCE COMMISSION, APPELLEE, TO PETITION OF APPELLANTS FOR REHEARING

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 393

STATE OF TENNESSEE, RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, AND HAMMOND FOWLER, JOHN C. HAMMER, AND CAYCE PENTECOST, AS MEMBERS OF AND CONSTITUTING THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

REPLY OF INTERSTATE COMMERCE COMMISSION, APPELLEE, TO PETITION OF APPELLANTS FOR REHEARING

The Interstate Commerce Commission, appellee, respectfully submits the following as its reply to appellants' petition for rehearing in the above-styled cause.

In their petition for rehearing appellants limit their attack to the Commission's findings with respect to the Tennessee intrastate rates on coal.

Appellants base their petition for rehearing on the following statement (pp. 1–2):

> * * * The Tennessee Valley Authority introduced substantial and uncontradicted evidence at the hearing before the Interstate Commerce Commission that the intrastate rates on coal were already higher than the interstate rates and were returning a greater margin above cost, but the Interstate Commerce Commission made no finding as to the relative levels of the interstate and intrastate rates.

It is respectfully submitted that the above statement is incorrect. The record clearly reveals that the evidence introduced by the Tennessee Valley Authority, at the hearing before the Commission, that the intrastate rates on coal "were already higher than the interstate rates and were returning a greater margin above cost," was not "substantial and uncontradicted." See Motion of the Interstate Commerce Commission to Affirm filed herein on October 8, 1953, pp. 9–10.

In considering the above contentions made by the Tennessee Valley Authority, the Commission made the following statement in its report, 286 I. C. C. 41, 54:

> In support of its contentions that intrastate coal rates in Tennessee are generally as high or higher than interstate coal rates, and that the going intrastate coal rates are more remunerative to the respondents than the interstate rates, the Tennessee Valley

> Authority relies upon computations based upon excerpts from the Carload Waybill Analyses, 1948, Statement No. 5032 and Statement No. 5028, issued in June 1950, by our Bureau of Transport Economics and Statistics. The computations were made by witnesses who could not give any of the shipping points covered by the statements or the transportation conditions or circumstances surrounding the movements or the establishment of the rates charged. The cost computations were also made in connection with excerpts from the waybill analyses statements. The traffic statistics included both intrastate and interstate movements. In the circumstances, the computations do not support conclusively these contentions. The evidence of record supports the conclusion that the respondents, after the decision of 1925 in the southern class rate investigation, adopted and have since followed the policy of maintaining intrastate rates throughout southern territory on the same relative level as interstate rates on practically all commodities. With respect to Tennessee, the exceptions are due to the action of the Tennessee commission in refusing to permit the intrastate rates on certain commodities to be increased to the full extent authorized in the interstate rates.

When considered in the light of the above-quoted statement of the Commission and the evidence in the case, it is submitted that there is no

basis for appellants' contention that the intrastate rates on coal were already higher than the interstate rates and were returning a greater margin above cost.

It is further submitted that in the light of the evidence of record and the statement of the Commission, above quoted, the Commission has found that the intrastate rates on coal were lower and produced less revenue than the interstate rates. See Motion of the Interstate Commerce Commission to Affirm filed herein on October 8, 1953.

Wherefore, for the foregoing reasons, it is respectfully submitted that appellants' petition for rehearing should be denied.

Respectfully submitted.

EDWARD M. REIDY,
Chief Counsel,

SAMUEL R. HOWELL,
Assistant Chief Counsel,
Interstate Commerce Commission.

U. S. GOVERNMENT PRINTING OFFICE: 1953

No. 393. TENNESSEE ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Middle District of Tennessee. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. *Alfred T. MacFarland* for the State of Tennessee et al., and *Joseph C. Swidler* for the Tennessee Valley Authority, appellants. *Charles J. McCarthy* was also of counsel. *Edward M. Reidy* and *Samuel R. Howell* for the Interstate Commerce Commission; and *James A. Bistline, A. J. Dixon, Frank W. Gwathmey, Edwin F. Hunt, Prime F. Osborn, William H. Swiggart* and *Charles P. Reynolds* for the Carolina, Clinchfield & Ohio Railway et al., appellees. Reported below: 113 F. Supp. 634.